

THE
CAROLINA LAW REPOSITORY.

Vol. I.

SEPTEMBER, 1813.

No 2-

CONTENTS.

| | | | |
|---|--------------|---|-----|
| Legal Biography. | | <i>Mastin,—Constitutionality of</i> | |
| <i>Life of Sir M. Hale. conclud.</i> | <i>p 139</i> | <i>summary trial,</i> | 246 |
| Law Opinion. | | <i>Carthy v. Webb—Letters of Ad-</i> | |
| <i>Sir R. Raymond's,</i> | 172 | <i>ministration,</i> | 247 |
| Juridical Selections. | | <i>Carr v. Hairston—Road discon-</i> | |
| <i>Dr. Croke's Judgment on Block-</i> | | <i>tinued,</i> | 249 |
| <i>ades and Licenses,</i> | 175 | <i>Hunter & Hunter v. Jackson and</i> | |
| <i>Judgment of Sir Wm. Scott in a</i> | | <i>Jackson—Racing Contract,</i> | 250 |
| <i>Prize Cause,</i> | 188 | <i>Nicholson v. Hilliard—Copies of</i> | |
| <i>Judge Davis's Opinion on the Li-</i> | | <i>deeds ev dence,</i> | 253 |
| <i>cence Trade,</i> | 190 | <i>Mealor v. Kimble—New Trial,</i> | 254 |
| <i>Argument & Judgment on the Li-</i> | | <i>Dickerson v. Dickerson—Trust,</i> | |
| <i>cence Trade,</i> | 204 | <i>and parol evidence,</i> | 262 |
| <i>Evans v. Robinson—Infringement</i> | | <i>Miller v. Spencer's Adm'tors—</i> | |
| <i>of Patent Right,</i> | 209 | <i>Assets after judgment</i> | 264 |
| <i>Custis v. Lane—Right of Suf-</i> | | <i>Everett v. Allison's Adm'rs et al.</i> | |
| <i>frage,</i> | 215 | <i>—Appeal Bond,</i> | 271 |
| Adjudged Cases in the Su- | | <i>Andrews v. Johnson—Mill-pond,</i> | |
| preme Court, N. C. | | <i>Trial on the premises,</i> | 272 |
| JULY TERM, 1811. | | <i>Alexander, County Trustee. v.</i> | |
| <i>Hollowell v. Devisees of Pope—</i> | | <i>Ex'or of Alexander—Limita-</i> | |
| <i>Act of '89, c. 23, pleaded by De</i> | | <i>tion Act of 1715,</i> | 273 |
| <i>visees,</i> | 221 | <i>Alberton v. Heirs of Redding—</i> | |
| <i>Williams v. Branson—Common</i> | | <i>Possession in Ejectment,</i> | 274 |
| <i>Carriers.</i> | 224 | <i>Boyt v. Cooper—Illegal Consider</i> | |
| JULY TERM, 1813. | | <i>ation,</i> | 277 |
| <i>Nichols v. Newsom—Possession</i> | | <i>Page v. Farmer—Debt in the de-</i> | |
| <i>and conversion of personals,</i> | 227 | <i>timet on penal statute,</i> | 278 |
| <i>Stewart v. Fitzgerald—Sheriff—</i> | | <i>Strong & al. v. Glasgow & al.—</i> | |
| <i>Bail,</i> | 234 | <i>—Trust,</i> | 279 |
| <i>Dodson v. Bush—Interpleader in</i> | | <i>Atkinson v. Farmer and others—</i> | |
| <i>case of attachment,</i> | 236 | <i>Want of Equity in Bill</i> | 281 |
| <i>Parish v. Fite—New Trial,</i> | 238 | <i>Executors of Spaight v. Heirs of</i> | |
| <i>Cotten v. Beasley—Race Contract,</i> | 239 | <i>Wade—Assets in the hands of</i> | |
| <i>Mann v. Parker—Deceit,</i> | 242 | <i>Heirs & Devisees,</i> | 284 |
| <i>Bank of Newbern v. Taylor and</i> | | <i>Nelson v. Stewart—Summary tri</i> | |
| | | <i>al for damage by horses, &c.</i> | 287 |
| | | <i>Cheatham v. Boykin et al.—Sci.</i> | |
| | | <i>fa against distributees on bond</i> | |
| | | <i>to refund,</i> | 289 |

RALEIGH:

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THE
CAROLINA LAW REPOSITORY.

Vol. I.

SEPTEMBER, 1813.

No. II.

THE LIFE OF SIR MATTHEW HALE.

Continued from Page 20.

THUS he continued administering justice till the Protector died ; but then he both refused the mournings that were sent to him and his servants for the funeral, and likewise to accept of the new commission that was offered him by Richard ; and when the rest of the Judges urged it upon him, and employed others to press him to accept of it, he rejected all their importunities, and said, " He could " act no longer under such authority."

He lived a private man till the Parliament met that called home the King, to which he was returned Knight of the shire from the county of Gloucester. It appeared at that time how much he was beloved and esteemed in his neighbourhood ; for though another who stood in competition with him had spent near a thousand pounds to procure voices (a great sum to be employed that way in those days) and he had been at no cost, and was so far from soliciting it, that he had stood out long against those who pressed him to appear, and he did not promise to appear till three days before the election, yet he was preferred. He was brought thither almost by violence, by the Lord Berkeley, who bore all the charge of the entertainments on the day of his election, which was considerable, and had engaged all his friends and interest for him : And whereas by the writ, a Knight of the shire must be *miles gladio cinctus*, and he had no sword, that noble lord girt him with his own sword during the election, but he was soon weary of it, for the

embroidery of the belt did not suit well with the plainness of his cloaths ; and indeed the election did not hold long, for as soon as ever he came into the field, he was chosen by much the greater number, though the poll continued for three or four days.

Soon after this, when the courts in Westminster-Hall came to be settled, he was made Lord Chief Baron ; and when the Earl of Clarendon (then Lord Chancellor) delivered him his commission, in the speech he made according to the custom on such occasions, he expressed his esteem of him in a very singular manner, telling him, among other things, " That if the King could have found out an " honester and fitter man for that employment, he would " not have advanced him to it ; and that he had therefore " preferred him, because he knew none that had deserved " it so well." It is ordinary for persons so promoted to be knighted, but he desired to avoid having that honour done him, and therefore for a considerable time declined all opportunities of waiting on the King ; which the Lord Chancellor observing, sent for him upon business one day, when the King was at his house, and told his Majesty there was his modest Chief Baron, upon which, he was unexpectedly knighted.

He continued eleven years in that place, managing the court, and all proceedings in it, with singular justice. It was observed by the whole nation, how much he raised the reputation and practice of it ; and those who held places and offices in it, can all declare, not only the impartiality of his justice, for that is but a common virtue, but his generosity, his vast diligence, and his great exactness in trials. This gave occasion to the only complaint that ever was made of him, " That he did not dispatch matters quick enough ;" but the great care he used, to put suits to a final end, as it made him slower in deciding them, so it had this good effect, that causes tried before him, were seldom, if ever, tried again.

But it will not seem strange, that a Judge behaved himself as he did, who, at the entry into his employment, set such excellent rules to himself, which will appear in the following paper, copied from the original under his own hand :

THINGS

Necessary to be had in continual Remembrance.

1. That in the administration of justice, I am entrusted for God, the King and Country ; and therefore,
2. That it be done, 1st, uprightly, 2d, deliberately, 3d, resolutely.
3. That I rest not upon my own understanding or strength, but implore and rest upon the direction and strength of God.
4. That in the execution of justice, I carefully lay aside my own passions, and not give way to them, however provoked.
5. That I be wholly intent upon the business I am about, remitting all other cares and thoughts, as unseasonable interruptions.
6. That I suffer not myself to be prepossessed with any judgment at all, till the whole business and both parties be heard.
7. That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard.
8. That in business capital, though my nature prompt me to pity, yet to consider that there is also a pity due to the country.
9. That I be not too rigid in matters purely conscientious, where all the harm is diversity of judgment.
10. That I be not biassed with compassion to the poor, or favour to the rich, in point of justice.

11. That popular, or court applause, or distaste, have no influence in any thing I do, in point of distribution of justice.

12. Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rule of justice.

13. If in criminals it be a measuring cast, to incline to mercy and acquittal.

14. In crimes that consist merely in words, when no more harm ensues, moderation is no injustice.

15. In criminals of blood, if the fact be evident, severity is justice.

16. To abhor all private solicitations, of what kind soever and by whomsoever, in matters depending.

17. To charge my servants, 1st, Not to interpose in any business whatsoever: 2d, Not to take more than their known fees: 3, Not to give any undue precedence to causes: 4, Not to recommend council.

11. To be short and sparing at meals, that I may be the fitter for business.

He would never receive private addresses or recommendations, from the greatest persons, in any matter in which justice was concerned. One of the first Peers of England went once to his chamber and told him, "That having a suit in law to be tried before him, he was then to acquaint him with it, that he might the better understand it when it should come to be heard in court." Upon which, the Lord Chief Baron interrupted him, and said, "He did not deal fairly to come to his chamber about such affairs, for he never received any information of causes but in open court, where both parties were to be heard alike;" so he would not suffer him to go on: Whereupon, his Grace for he was a Duke) went away not a little dissatisfied, and complained of it to the King, as a rudeness that was not to be endured. But his Majesty bid him "content himself

“ that he was no worse used, and said, he verily believed
“ he would have used himself no better, if he had gone to
“ solicit him in any of his causes.”

Another passage fell out in one of his circuits, which was somewhat censured as an affectation of an unreasonable strictness ; but it flowed from the exactness to the rules he had set himself. A gentleman had sent him a buck for his table, that had a trial at the assizes, so when he heard his name, he asked “ if he was not the same person that had
“ sent him venison ?” and finding he was the same, he told him, “ he could not suffer the trial to go on, till he had
“ paid him for his buck.” To which the gentleman answered, “ That he never sold his venison, and that he had
“ done nothing to him, which he did not do to every Judge
“ that had gone that circuit ;” which was confirmed by several gentlemen then present ; but all would not do, for the Lord Chief Baron had learned from Solomon, that “ a gift
“ perverteth the ways of judgment,” and therefore he would not suffer the trial to go on, till he had paid for the present ; upon which the gentleman withdrew the record : And at Salisbury, the Dean and Chapter having, according to the custom, presented him with six sugar-loaves in his circuit, he made his servants pay for the sugar before he would try their cause.

It was not so easy for him to throw off the importunities of the poor, for whom his compassion wrought more powerfully than his regard for wealth and greatness ; yet when justice was concerned, even that did not turn him out of the way. There was one that had been put out of a place for some ill behaviour, who urged the Lord Chief Baron to set his hand to a certificate, to restore him to it, or provide him with another ; but he told him plainly, “ His fault was such that he
“ could not do it.” The other pressed him vehemently, and fell down on his knees, and begged it of him with many tears ; but finding that he could not prevail, he said, “ He should be

“utterly ruined if he did it not; and he should curse him
“for it every day.” But that having no effect, then he fell
out into all the reproachful words that passion and despair
could inspire him with: To which, all the answer the Lord
Chief Baron made was, “That he could very well bear all
“his reproaches, but he could not for all that set his hand to
“his certificate.” He saw he was poor, so he gave him a
large charity and sent him away.

He looked with great sorrow on the impiety and atheism of
the age, and so he set himself to oppose it, not only by the
shining example of his own life, but by engaging in a cause
that indeed could hardly fall into better hands; and as he
could not find a subject more worthy of himself, so there were
few in the age that understood it so well, and could manage it
more skilfully. The occasion that first led him to write about
it was this: He was a strict observer of the Lord’s Day, in
which, besides his constancy in the public worship of God, he
used to call all his family together, and to repeat to them the
heads of the sermons, with some additions of his own, which
he fitted for their capacities and circumstances; and that be-
ing done, he had a custom of shutting himself up for two or
three hours, which he either spent in his secret devotions, or
on such profitable meditations as did then occur to his
thoughts: He wrote them with the same simplicity that he
formed them in his mind, without any art, or so much as a
thought to let them be published. He never corrected them,
but laid them by when he had finished them, having intended
only to fix and preserve his own reflections in them; so that
he used no sort of care to polish them, or make the first
draught more perfect than when they fell from his pen:
These fell into the hands of a worthy person, and he judging,
as well he might, that the communicating them to the world
might be a public service, printed two volumes of them in
octavo, a little before the author’s death.

The Lord Chief Justice Keyling dying, he was on the 13th of May, 1671, promoted to be the Lord Chief Justice of England. He had made the pleas of the crown one of his chief studies, and by much search and long observation, had composed that great work concerning them, formerly mentioned. He that holds the high office of Justiciary in that court, being the chief trustee and asserter of the liberties of his country, all the people applauded this choice, and thought their liberties could not be better deposited than in the hands of one, that as he understood them well, so he had all the justice and courage that so sacred a trust required. One thing was much observed and commended in him, that when there was a great inequality in the ability and learning of the counsellors that were to plead one against another, he thought it became him, as the Judge, to supply that, so he would enforce what the weaker council managed but indifferently, and not suffer the more learned to carry the business by the advantage they had over the others in their quickness and skill in law, and readiness in pleading, till all things were cleared in which the merits and strength of the ill defended cause lay. He was not satisfied barely to give his judgment in causes, but did, especially in all intricate ones, give such an account of the reasons that prevailed with him, that the council did not only acquiesce in his authority, but were so convinced by his reasons, that I have heard many profess that he brought them often to change their opinions ; so that his giving of judgment was really a learned lecture upon that point of law : And which was yet more, the parties themselves, though interest does commonly corrupt the judgment, were generally satisfied with the justice of his decisions, even when they were made against them. His impartial justice and great diligence drew the chief practice after him, into whatsoever court he came ; since, though the courts of common pleas, the exchequer and the king's bench, are appointed for the trial of causes of different natures, yet it is easy to bring most

causes into any of them, as the council or attorneys please, so as he had drawn the business much after him, both into the common pleas and the exchequer, it now followed him into the king's bench, and many causes that were depending in the exchequer and not determined, were let fall there, and brought again before him in the court to which he was now removed. And here did he spend the rest of his public life and employment; but about four years and a half after his advancement, he who had hitherto enjoyed a firm and vigorous health, to which his great temperance, and the equality of his mind did not a little conduce, was on a sudden brought very low by an inflammation in his midriff, which, in two days time, broke the constitution of his health to such a degree, that he never recovered it. He became so asthmatical, that with great difficulty he could fetch his breath, that determined in a dropsy, of which he afterwards died. He understood physic so well, that, considering his age, he concluded his distemper must carry him off in a little time; and therefore he resolved to have some of the last months of his life reserved to himself, that being freed of all worldly cares, he might be preparing for his change. He was also so much disabled in his body, that he could hardly, though supported by his servants, walk through Westminster-Hall, or endure the toil of business. He had been a long time wearied with the distractions that his employment had brought on him, and his profession was become ungrateful to him; he loved to apply himself wholly to better purposes, as will appear by a paper that he wrote on this subject, which I shall here insert.

1. " If I consider the business of my profession, whether
" as an Advocate or as a Judge, it is true, I do acknow-
" ledge, by the institution of Almighty God, and the dis-
" pensation of his Providence, I am bound to industry and
" fidelity in it: And as it is an act of obedience to his will,
" it carries with it something of religious duty, and I may

“ and do take comfort in it, and expect a reward of my obedience to him, and the good that I do to mankind therein, from the bounty and beneficence and promise of Almighty God ; and it is true also, without such employments, civil societies cannot be supported, and great good redounds to mankind from them, and in those respects, the conscience of my own industry, fidelity and integrity in them, is a great comfort and satisfaction to me. But yet this I must say concerning these employments, considered simply in themselves, that they are very full of cares, anxieties and perturbations.

2. “ That though they are beneficial to others, yet they are of the least benefit to him that is employed in them.

3. “ That they do necessarily involve the party, whose office it is, in great dangers, difficulties and calumnies.

4. “ That they only serve for the meridian of this life, which is short and uncertain.

5. “ That though it be my duty faithfully to serve in them, while I am called to them, and till I am duly called from them, yet they are great consumers of that little time we have here, which as it seems to me, might be better spent in a pious contemplative life, and a due provision for eternity. I do not know a better temporal employment than Martha had, in testifying her love and duty to our Saviour, by making provision for him : yet our Lord tells her That though she was troubled about many things, there was only one thing necessary, and Mary had chosen the better part.”

By this the reader will see, that he continued in his station upon no other consideration but that, being set in it by the Providence of God, he judged he could not abandon that post which was assigned him, without preferring his

own private inclination to the choice God had made for him, but now that same Providence having, by this great distemper, disengaged him from the obligation of holding a place which he was no longer able to discharge, he resolved to resign it. This was no sooner surmised abroad, than it drew upon him the importunities of all his friends, and the clamour of the whole town to divert him from it; but all was to no purpose. There was but one argument that could move him, which was, "That he was obliged to continue the employment God had put him in for the good of the public." But to this he had such an answer, that even those who were most concerned in his withdrawing, could not but see that the reasons inducing him to it, were but too strong. So he made applications to his Majesty for his writ of ease, which the King was very unwilling to grant him, and offered to let him hold his place still, he doing what business he could in his chamber; but he said, "he could not with a good conscience continue in it, since he was no longer able to discharge the duty belonging to it."

But yet, such was the general satisfaction which all the kingdom received by his excellent administration of justice, that the King, though he could not well deny his request, yet he deferred the granting of it as long as was possible. Nor could the Lord Chancellor be prevailed with to move the King to hasten his discharge, though the Chief Justice often pressed him to it.

At last, having wearied himself and all his friends with his importunate desires, and growing sensibly weaker in body, he did, upon the 21st day of February, 28 Car. II. A. D. 1675-6, go before a Master of the Chancery, with a little parchment deed, drawn by himself, and written with his own hand, and there sealed and delivered it, and acknowledged it to be enrolled, and afterwards he brought the original deed to the Lord Chancellor, and did formally surrender his office.

He had the day before surrendered to the King in person, who parted from him with great grace, wishing him most heartily the return of his health, and assuring him, "That he would still look upon him as one of his Judges, and have recourse to his advice, when his health would permit, and in the mean time would continue his pension during his life."

The good man thought this bounty too great, and an ill precedent for the King, and therefore wrote a letter to the Lord Treasurer, earnestly desiring that his pension might be only during pleasure, but the King would grant it for life, and make it payable quarterly.

And yet for a whole month together, he would not suffer his servant to sue out his patent for his pension; and when the first payment was received, he ordered a great part of it for charitable uses, and said he intended most of it should be so employed, as long as it was paid him.

Having now attained to that privacy which he had no less seriously than piously wished for, he called all his servants that had belonged to his office together, and told them, "he had now laid down his place, and so their employments were determined." Upon that, he advised them to see for themselves, and gave to some of them very considerable presents, and to every one of them a token, and so dismissed all those that were not his domestics. He was discharged the 15th of February, 1675-6, and lived till the Christmas following, but all the while was in so ill a state of health, that there was no hopes of his recovery. He continued still to retire often, both for his devotion and studies, and as long as he could go, went constantly to his closet, and when his infirmities increased on him, so that he was not able to go thither himself, he made his servants carry him thither in a chair. At last, as the winter came on, he saw, with great joy, his deliverance approaching; for, be-

sides his being weary of the world, and his longings for the blessedness of another state, his pains increased so on him, that no patience inferior to his, could have borne them without great uneasiness of mind ; yet he expressed to the last, such submission to the will of God, and so equal a temper under them, that it was visible then, what mighty effects his Philosophy and Christianity had on him, in supporting him under such a heavy load.

He could not lie down in bed above a year before his death, by reason of the asthma, but sat rather than lay in it.

He was attended in this sickness by a pious and worthy divine, Mr. Evan Griffith, minister of the parish ; and it was observed, that in all the extremities of his pain, whenever he prayed by him, he forbore all complaints or groans, but with his hands and eyes lifted up, was fixed in his devotions. Not long before his death, the minister told him, “ There was to be a sacrament next Sunday at church, but “ he believed he could not come and partake with the rest ; “ therefore, he would give it to him in his own house : ” But he answered, “ No, his Heavenly Father had prepared “ a feast for him, and he would go to his father’s house to “ partake of it.” So he made himself be carried thither in his chair, where he received the sacrament on his knees, with great devotion, which it may be supposed was the greater, because he apprehended it was to be the last, and so took it as his *viaticum* and provision for his journey. He had some secret, unaccountable presages of his death ; for he said, “ That if he did not die on such a day (which “ fell to be the 25th of November) he believed he should “ live a month longer ; ” and he died that very day month. He continued to enjoy the free use of his reason and sense to the last moment, which he had often and earnestly prayed for during his sickness : And when his voice was so sunk that he could not be heard, they perceived, by the almost constant lifting up of his eyes and hands, that he was still

aspiring to that blessed state, of which he was now speedily to be possessed.

He had for many years a particular devotion for Christmas-day; and after he had received the sacrament, and been in the performance of the public worship of that day, he commonly wrote a copy of verses on the honour of his Saviour, as a fit expression of the joy he felt in his soul, at the return of that glorious anniversary. There are seventeen of those copies printed, which he wrote on seventeen several Christmas-days, by which the world has a taste of his poetical genius; in which, if he had thought it worth his time to have excelled, he might have been eminent, as well as in other things; but he composed them rather to entertain himself, than to merit the laurel.

On this Christmas-day, he was to be admitted to bear his part in the new songs above: So that day which he had spent in so much spiritual joy, proved to be indeed the day of his jubilee and deliverance, for between two and three in the afternoon, he breathed out his righteous and pious soul. His end was peace; he had no strugglings, nor seemed to be in any pangs in his last moments. He was buried on the 4th of January, Mr. Griffith preaching the funeral sermon—his text the 57th of Isaiah, v. 1. “The righteous perisheth, and no man layeth it to heart; and merciful men are taken away, none considering that the righteous is taken away from the evil to come.” Which, how fitly it was applicable upon this occasion, all that consider the course of his life, will easily conclude. He was interred in the church-yard of Alderley, among his ancestors. He did not much approve of burying in churches, and used to say, “The churches were for the living, and the church-yards for the dead.” His monument was like himself, decent and plain. The tombstone was black marble, and the sides were black and white marble, upon which he himself had ordered this bare and humble inscription to be made:

Hic inhumatur corpus
 MATTHEI HALE,
 MILITIS
 ROBERTI HALE ET JOANNÆ
 UXORIS EJUS FILII UNICI.

Nati in hac Parochia de Alderley,
*Primo die Novembris, Anno Domini 1609. Denati vero
 ibidem vicesimo quinto die Decembris, Anno Domini
 1676. Ætatis suæ, LXVII.*

Having thus given an account of the most remarkable things of his life, I am now to present the reader with such a character of him as the laying his several virtues together will amount to: In which I know how difficult a task I undertake; for, to write defectively of him were to injure him, and lessen the memory of one to whom I intend to do all the right that is in my power. On the other hand, there is so much here to be commended and proposed for the imitation of others, that I am afraid some may imagine, I am rather making a picture of him, from an abstracted idea of great virtues and perfections, than setting him out as he truly was: But there is great encouragement in this, that I write concerning a man so fresh in all people's remembrance, that is so lately dead, and was so much and so well known, that I shall have many vouchers, who will be ready to justify me in all that I am to relate, and to add a great deal to what I can say.

It has appeared in the account of his various learning, how great his capacities were, and how much they were improved by constant study. He rose always early in the morning, he loved to walk much abroad, not only for his health, but he thought it opened his mind and enlarged his thoughts to have the creation of God before his eyes. When he set himself to any study, he used to cast his design in a scheme, which he did with a great exactness of method. He took nothing on trust, but pursued his enquiries as far

as they could go ; and as he was humble enough to confess his ignorance, and submit to mysteries which he could not comprehend, so he was not easily imposed on, by any shews of reason, or the bugbears of vulgar opinion. He brought all his knowledge as much to scientific principles as he possibly could, which made him neglect the study of tongues, for the bent of his mind lay another way. Discoursing once of this to some, they said, " They looked on the common law as a study that could not be brought into a scheme, nor formed into a rational science, by reason of the indigestedness of it, and the multiplicity of the cases in it, which rendered it very hard to be understood, or reduced into a method : " But he said, " He was not of their mind ; " and so quickly after, he drew with his own hand, a scheme of the whole order and parts of it, in a large sheet of paper, to the great satisfaction of those to whom he sent it. Upon this hint, some pressed him to compile a body of the English law. It could hardly ever be done by a man who knew it better, and would, with more judgment and industry, have put it into method : But he said, " As it was a great and noble design, which would be of vast advantage to the nation, so it was too much for a private man to undertake ; it was not to be entered upon but by the command of a Prince, and with the communicated endeavours of some of the most eminent of the profession."

He had great vivacity in his fancy, as may appear by his inclination to poetry, and the lively illustrations, and many tender strains in his Contemplations ; but he looked on eloquence and wit as things to be used very chastely. In serious matters, which should come under a severer enquiry, therefore, he was, both when at the bar and on the bench, a great enemy to all eloquence or rhetoric in pleading. He said, " If the Judge or Jury had a right understanding, it signified nothing, but a waste of time and loss of words ; " and if they were weak, and easily wrought on, it was a

“ more decent way of corrupting them, by bribing their “ fancies and biassing their affections ;” and wondered much at that affectation of the French lawyers, in imitating the Roman orators in their pleadings. For the oratory of the Romans was occasioned by their popular Government, and the factions of the city, so that those who intended to excel in the pleading of causes, were trained up in the schools of the Rhetors, till they became ready and expert in that luscious way of discourse. It is true, the compositions of such a man as Tully was, who mixed an extraordinary quickness, an exact judgment and just decorum with his skill in Rhetoric, do still entertain the readers of them with great pleasure : But at the same time it must be acknowledged, that there is not that chastity of style, that closeness of reasoning, nor that justness of figures in his orations, that is in his other writings ; so that a great deal was said by him, rather because he knew it would be acceptable to his auditors, than that it was approved of by himself ; and all who read them will acknowledge, they are better pleased with them as essays of wit and style, than as pleadings, by which such a Judge as ours was, would not be much wrought on. And if there are such grounds to censure the performances of the greatest master in Eloquence, we may easily infer what nauseous discourses the other orators made, since, in Oratory, as well as in Poetry, none can do indifferently. So our Judge wondered to find the French, that live under a Monarchy, so fond of imitating that which was an ill effect of the popular Government of Rome. He therefore pleaded himself always in few words, and home to the point ; and when he was a Judge, he held those that pleaded before him to the main hinge of the business, and cut them short when they made excursions about circumstances of no moment, by which he saved much time, and made the chief difficulties be well stated and cleared.

There was another custom among the Romans, which he as much admired, as he despised their Rhetoric, which was

that the Juris-consults were the men of the highest quality, who were bred to be capable of the chief employment in the State, and became the greatest masters of their law. These gave their opinions of all cases that were put to them freely, judging it below them to take any present for it; and indeed, they were only the true lawyers among them, whose resolutions were of that authority, that they made one classis of those materials out of which Trebonian combed the digests under Justinian; for the Orators, or *Causidici*, that pleaded causes, knew little of the law, and only employed their mercenary tongues to work on the affections of the People and Senate, or the Prætors. Even in most of Tully's Orationes, there is little of law, and that little which they might sprinkle in their declamations, they had not from their own knowledge, but the resolution of some Juris-consult; according to that famous story of Servius Sulpitius, who was a celebrated Orator, and being to receive the resolution of one of those that were learned in the law, was so ignorant that he could not understand it: Upon which the Juris-consult reproached him, and said, "It was a shame for him that was a nobleman, a senator, and a pleader of causes, to be thus ignorant of law." This touched him so sensibly, that he set about the study of it, and became one of the most eminent Juris-consults that ever were at Rome. Our Judge thought it might become the greatness of a Prince, to encourage such a sort of men, and of studies, in which none in the age he lived in was equal to the great Selden, who was truly in our English law, what the old Roman Juris-consults were in theirs.

But where a decent eloquence was allowable, Judge Hale knew how to have excelled as much as any, either in illustrating his reasonings, by proper and well pursued similies, or by such tender expressions as might work most on the affections; so that the present Lord Chancellor has often said of him since his death, "That he was the greatest Orator he had known;" for though his words came not

fluently from him, yet when they were out, they were the most significant and expressive that the matter could bear. Of this sort there are many in his Contemplations, made to quicken his own devotion, which have a life in them becoming him that used them, and a softness fit to melt even the harshest tempers, accommodated to the gravity of the subject, and apt to excite warm thoughts in the readers, that as they shew his excellent temper that brought them out, and applied them to himself, so they are of great use to all, who would inform and quicken their minds.

As for his virtues, they have appeared so conspicuous in all the several transactions and turns of his life, that it may seem needless to add any more of them, than has been already related ; but there are many particular instances which I knew not how to fit to the several years of his life, which will give us a clearer and better view of him.

He was a devout Christian, a sincere Protestant, and a true son of the Church of England ; moderate towards dissenters, and just even to those from whom he differed most ; which appeared signally in the care he took of preserving the Quakers, from that mischief that was like to fall on them, by declaring their marriages void, and so bastarding their children ; but he considered marriage and succession as a right of nature, from which none ought to be barred, what mistake soever they might be under, in the points of revealed religion.

And therefore, in a trial that was before him, when a Quaker was sued for some debts owing by his wife before he married her, and the Quaker's council pretended " that " it was no marriage that had passed between them, since " it was not solemnized according to the rules of the Church " of England ;" he declared he was not willing, on his own opinion, to make their children bastards, and gave directions to the jury to find it special. It was a reflection on the

whole party, that one of them, to avoid an inconvenience he had fallen in, thought to have preserved himself by a defence, that if it had been allowed in law, must have made their whole issue bastards, and incapable of succession; and for all their intended friendship to one another, if this Judge had not been more their friend, than one of those they so called, their posterity had been little beholden to them. But he governed himself indeed by the law of the Gospel, of "doing to others what he would have others do to him;" and therefore, because he would have thought it a hardship, not without cruelty, if, among Papists, all marriages were null, which had not been made with all the ceremonies in the Roman ritual, so he applying this to the case of the sectaries, he thought all marriages made, according to the several persuasions of men, ought to have their effects in law.

He used constantly to worship God in his family, performing it always himself, if there was no clergyman present; but as to his private exercises in devotion, he took that extraordinary care to keep what he did secret, that this part of his character must be defective, except it be acknowledged, that humility in covering it, commends him much more, than the highest expression of devotion could have done.

From the first time that the impressions of religion settled deeply in his mind, he used great caution to conceal it, not only in obedience to the rules given by our Saviour, of fasting, praying, and giving alms in secret, but from a particular distrust he had of himself; for he said, he was afraid he should, at some time or other, do some enormous thing, which, if he were looked upon as a very religious man, might cast a reproach on the profession of it, and give great advantages to impious men to blaspheme the name of God: "But a tree is known by its fruits;" and he lived not only free of blemishes or scandal, but shined in all the parts of his conversation; and perhaps the distrust he was in of him-

self, contributed not a little to the purity of his life ; for he being thereby obliged to be more watchful over himself, and to depend more on the aids of the Spirit of God, no wonder if that humble temper produced those excellent effects on him.

He had a soul enlarged and raised above that mean appetite of loving money, which is generally the root of all evil. He did not take the profits that he might have had by his practice ; for, in common cases, when those who came to ask his counsel gave him a piece, he used to give back the half, and so made ten shillings his fee, in ordinary matters that did not require much time or study. If he saw a cause was unjust, he, for a great while, would not meddle further in it, but to give his advice that it was so : If the parties after that would go on, they were to seek another counsellor, for he would assist none in acts of injustice : If he found the cause doubtful or weak in point of law, he always advised his clients to agree their business ; yet afterwards he abated much of the scrupulosity he had about causes that appeared at first view unjust. Upon this occasion, there were two causes brought to him, which, by the ignorance of the party, or their attorney, were so ill represented to him, that they seemed to be very bad ; but he enquiring more narrowly into them, found they were really very good and just ; so, after this, he slackened much of his former strictness, of his refusing to meddle in causes, upon the ill circumstances that appeared in them at first.

In his pleading, he abhorred those too common faults of misreciting evidences, quoting precedents or books falsely, or asserting things confidently ; by which ignorant juries, or weak Judges, are too often wrought on. He pleaded with the same sincerity that he used in the other parts of his life, and used to say, “ It was as great a dishonour as a “ man was capable of, that, for a little money, he was to be “ hired to say or do otherwise than as he thought.” All

this he ascribed to the unmeasurable desire of heaping up wealth, which corrupted the souls of some that seemed to be otherwise born and made for great things.

When he was a practitioner, differences were often referred to him, which he settled, but would accept of no reward for his pains, though offered by both parties together, after the agreement was made; for he said, in those cases, "he was made a judge, and a judge ought to take no money." If they told him, "he lost much of his time in considering their business, and so ought to be acknowledged for it:" His answer was (as one that heard it told me) "Can I spend my time better than to make people friends? Must I have no time to do good in?"

He was naturally a quick man, yet by much practice on himself, he subdued that to such a degree, that he would never run suddenly into any conclusion concerning any matter of importance. *Festina lente* was his beloved motto, which he ordered to be engraven on the head of his staff, and was often heard say, "That he had observed many witty men run into great errors, because they did not give themselves time to think, but the heat of imagination making some notions appear in good colours to them, they, without staying till that cooled, were violently led by the impulses it made on them, whereas calm and slow men, who pass for dull in the common estimation, could search after truth and find it out, as with more deliberation, so with greater certainty."

He laid aside the tenth penny of all he got for the poor, and took great care to be well informed of proper objects for his charities; and after he was a Judge, many of the perquisites of his place, as his dividend of the rule and box-money, were sent by him to the goals to discharge poor prisoners, who never knew from whose hands their relief came. It is also a custom for the Marshal of the King's Bench, to

present the Judges of that Court with a piece of plate for a new-year's gift, that for the Chief Justice being larger than the rest. This he intended to have refused, but the other Judges told him, it belonged to his office, and the refusing it would be a prejudice to his successors, so he was persuaded to take it; but he sent word to the Marshal, "That instead of plate, he should bring him the value of it in money," and when he received it, he immediately sent it to the prisons, for the relief and discharge of the poor there. He usually invited his poor neighbours to dine with him, and made them sit at table with himself; and if any of them were sick, so that they could not come, he would send meat warm to them from his table; and he did not only relieve the poor in his own parish, but sent supplies to the neighbouring parishes, as there was occasion for it; and he treated them all with the tenderness and familiarity that became one, who considered they were of the same nature with himself, and were reduced to no other necessities but such as he himself might be brought to: But for common beggars, if any of these came to him as he was in his walks, when he lived in the country, he would ask such as were capable of working, "Why they went about so idly?" If they answered, "It was because they could find no work," he often sent them to some field to gather all the stones in it, and lay them on a heap, and then would pay them liberally for their pains. This being done, he used to send his carts, and caused them to be carried to such places of the highway as needed mending.

But when he was in town, he dealt his charities very liberally, even among the street beggars, and when some told him, "That he thereby encouraged idleness, and that most of these were notorious cheats," he used to answer, "That he believed most of them were such, but among them, there were some that were great objects of charity, and were pressed with grievous necessities, and that he had rather give his alms to twenty, who might be perhaps

“rogues, than that one of the other sort should perish for
“want of that small relief which he gave them.”

He loved building much, which he affected chiefly, because it employed many poor people ; but one thing was observed in all his buildings, that the changes he made in his houses, were always from magnificence to usefulness ; for he avoided every thing that looked like pomp or vanity, even in the walls of his house. He had good judgment in architecture, and an excellent faculty in contriving well.

He was a gentle landlord to all his tenants, and was ever ready, upon any reasonable complaints, to make abatements, for he was merciful as well as righteous. One instance of this was, of a widow that lived in London, and had a small estate near his house in the country ; from which her rents were ill returned to her, and at a cost which she could not well bear ; so she bemoaned herself to him, and he, according to his readiness to assist all poor people, told her, “He
“would order his steward to take up her rents, and the re-
“turning them should cost her nothing.” But after that, when there was a falling of rents in that country, so that it was necessary to make abatements to the tenant, yet he would have it to lie on himself, and made the widow be paid her rent as formerly.

Another remarkable instance of his justice and goodness was, that when he found ill money had been put into his hands, he would never suffer it to be vented again ; for he thought it was no excuse for him to put false money in other people’s hands, because some had put it in his : A great heap of this he had gathered together ; for many had so far abused his goodness as to mix base money among the fees that were given him. It is likely he intended to have destroyed it ; but some thieves who had observed it, broke into his chamber and stole it, thinking they had got a prize ; which he used to tell with some pleasure, imagining how

they found themselves deceived, when they perceived what sort of booty they had fallen on.

After he was made a Judge, he would needs pay more for every purchase than it was worth: If it had been but a horse he was to buy, he would have outbid the price; and when some represented to him, "That he made ill bargains," he said, "It became Judges to pay more for what they bought than the true value; that so those with whom they dealt, might not think they had any right to their favour, by having sold such things to them at an easy rate:" And said it was suitable to the reputation which a Judge ought to preserve, to make such bargains that the world might see they were not too well used upon some secret account.

In sum, his estate did shew how little he had minded the raising a great fortune, for from a hundred pound a year, he raised it not quite to nine hundred, and of this a very considerable part came in by his share of Mr. Selden's estate: Yet this, considering his very great practice while a counsellor, and his constant frugal and modest way of living, was but a small fortune. In the share that fell to him by Mr. Selden's will, one memorable thing was done by him, with the other executors, by which they both shewed their regard to their dead friend, and their love of the public. His library was valued at some thousands of pounds, and was believed to be one of the most curious collections in Europe: So they resolved to keep this entire, for the honour of Selden's memory, and gave it to the University of Oxford, where a noble room was added to the former library for its reception, and all due respects have been since shewn by that great and learned body, to those their worthy benefactors, who not only parted so generously with this great treasure, but were a little put to it how to oblige them, without crossing the will of their dead friend. Mr. Selden had once intended to give his library to that university, and had left it so by his will; but having occasion for a manuscript

which belonged to their library, they asked of him a bond of a thousand pounds for its restitution. This he took so ill at their hands, that he struck out that part of his will by which he had given them his library, and with some passion declared, "they should never have it." The executors stuck at this a little; but having considered better of it, came to this resolution: That they were to be the executors of Mr. Selden's will, and not of his passion; so they made good what he had intended in cold blood, and past over what passion had suggested to him.

The parting with so many excellent books, would have been as uneasy to our Judge, as any thing of that nature could be, if a pious regard to his friend's memory had not prevailed over him, for he valued books and manuscripts above all things in the world. He himself had made a great and rare collection of manuscripts belonging to the law of England—he was forty years in gathering it. He himself said, "It cost him about fifteen hundred pounds," and calls it in his will, "A treasure worth having and keeping, and not fit for every man's view." These all he left to Lincoln's Inn.

By all these instances it appears, how much he was raised above the world, or the love of it. But having thus mastered things without him, his next study was to overcome his own inclinations. He was, as he said himself, naturally passionate: I add, as he said himself, for that appeared by no other evidence, save that sometimes his colour would rise a little, but he so governed himself, that those who lived long about him, have told me they never saw him disordered with anger, though he met with some trials, that the nature of man is as little able to bear as any whatsoever. There was one who did him a great injury, which it is not necessary to mention, who coming afterwards to him for his advice in the settlement of his estate, he gave it very frankly to him, but would accept of no fee for it, and thereby shewed

both that he could forgive as a Christian, and that he had the soul of a gentleman in him not to take money of one that had wronged him so heinously. And when he was asked by one "How he could use a man so kindly that had wronged him so much," his answer was, "He thanked God he had learned to forget injuries." And besides the great temper he expressed in all his public employments, in his family he was a very gentle master. He was tender of all his servants, he never turned any away, except they were so faulty that there was no hope of reclaiming them: When any of them had been long out of the way, or had neglected any part of their duty, he would not see them at their first coming home, and sometimes not till the next day, lest, when his displeasure was quick upon him, he might have chid them indecently; and when he did reprove them, he did it with that sweetness and gravity, that it appeared he was more concerned for their having done a fault, than for the offence given by it to himself; but if they became immoral or unruly, then he turned them away; for he said "He that by his place ought to punish disorders in other people, must by no means suffer them in his own house." He advanced his servants according to the time they had been about him, and would never give occasion to envy among them, by raising the younger clerks above those who had been longer with him. He treated them all with great affection, rather as a friend, than a master, giving them often good advice and instruction. He made those who had good places under him, give some of the profit to the other servants who had nothing but their wages. When he made his will, he left legacies to every one of them; but he expressed a more particular kindness for one of them, Robert Gibbon, of the Middle Temple, Esq. in whom he had that confidence, that he left him one of his executors. I rather mention him, because of his noble gratitude to his worthy benefactor and master, for he has been so careful to preserve his memory, that as he set those on me, at whose

desire I undertook to write his life, so he has procured for me a great part of those memorials and informations, out of which I have composed it.

The Judge was of a most tender and compassionate nature. This eminently appeared in his trying and giving sentence upon criminals, in which he was strictly careful, that not a circumstance should be neglected, which might any way clear the fact. He behaved himself with that regard to the prisoners, which became both the gravity of a Judge, and the pity that was due to men, whose lives lay at stake, so that nothing of jeering or unreasonable severity ever fell from him. He also examined the witnesses in the softest manner, taking care that they should be put under no confusion which might disorder their memory; and he summed up all the evidence so equally when he charged the jury, that the criminals themselves never complained of him. When it came to him to give sentence, he did it with that composedness and decency, and his speeches to the prisoners, directing them to prepare for death, were so weighty, so free of all affectation, and so serious and devout, that many loved to go to the trials, when he sat Judge, to be edified by his speeches, and behaviour in them, and used to say, "They heard very few such sermons."

But though the pronouncing the sentence of death, was the piece of his employment that went most against the grain with him; yet in that he could never be mollified to any tenderness which hindered justice. When he was once pressed to recommend some (whom he had condemned) to his Majesty's mercy and pardon, he answered, "He could not think they deserved a pardon, whom he himself had adjudged to die:" So that all he could do of that kind, was to give the King a true account of the circumstances of the fact, after which his Majesty was to consider whether he would interpose his mercy, or let justice take place.

His mercifulness extended even to his beasts, for when the horses that he had kept long, grew old, he would not suffer them to be sold or much wrought, but ordered his men to turn them loose on his grounds, and put them only to easy work, such as going to market and the like. He used old dogs also with the same care. His shepherd having one that was become blind with age, he intended to have killed or lost him, but the Judge coming to hear of it, made one of his servants bring him home and feed him till he died : And he was scarcely ever seen more angry than with one of his servants for neglecting a bird that he kept, so that it died for want of food.

He was a great encourager of all young persons that he saw followed their books diligently, to whom he used to give directions concerning the method of their study, with a humanity and sweetness, that wrought much on all who came near him, and, in a smiling, pleasant way, he would admonish them. If he saw any thing amiss in them, particularly if they went too fine in their cloaths, he would tell them, " it did not become their profession." He was not pleased to see students wear long periwigs, or attorneys go with swords ; so that such young men as would not be persuaded to part with those vanities, when they went to him, laid them aside, and went as plain as they could, to avoid the reproof which they knew they might otherwise expect.

He was very free and communicative in his discourse, which he most commonly fixed on some good and useful subject, and loved, for an hour or two at night, to be visited by some of his friends. He neither said nor did any thing with affectation, but used a simplicity, that was both natural to himself, and very easy to others ; and though he never studied the modes of civility or court-breeding, yet he knew not what it was to be rude or harsh with any, except he were impertinently addressed in matters of justice, then he would raise his voice a little, and so shake off those importunities.

In his furniture, and the service of his table, and way of living, he liked the old plainness so well, that as he would set up none of the new fashions, so he rather affected a coarseness in the use of the old ones; which was more the effect of his philosophy, than disposition, for he loved fine things too much at first. He was always of an equal temper, rather chearful than merry. Many wondered to see the evenness of his deportment, in some very sad passages of his life.

Having lost one of his sons, the manner of whose death had some grievous circumstances in it, one coming to see him, and condole, he said to him, "Those were the effects of living long, such must look to see many sad and unacceptable things;" and having said that, he went to other discourses, with his ordinary freedom of mind: For though he had a temper so tender, that sad things were apt enough to make deep impressions upon him, yet the regard he had to the wisdom and providence of God, and the just estimate he made of all external things, did, to admiration, maintain the tranquillity of his mind, and he gave no occasion, by idleness, to melancholy to corrupt his spirit, but by the perpetual bent of his thoughts, he knew well how to divert them from being oppressed with the excesses of sorrow.

He had a generous and noble idea of God in his mind, and this he found, above all other considerations, preserve his quiet. And indeed that was so well established in him, that no accidents, how sudden soever, were observed to discompose him: Of which, an eminent man in that profession gave me this instance. In the year 1666, an opinion ran through the nation, "That the end of the world would come that year." This, whether set on by astrologers, or advanced by those who thought it might have some relation to the number of the beast in the Revelation, or promoted by men of ill designs to disturb the public peace, had spread mightily among the people; and Judge Hale going that year

the western circuit, it happened that, as he was on the bench, at the assizes, a most terrible storm fell out very unexpectedly, accompanied with such flashes of lightning and claps of thunder, that the like will hardly fall out in an age ; upon which, a whisper or a rumour run through the crowd, " That now was the world to end, and the day of judgment to begin ;" and at this there followed a general consternation in the whole assembly, and all men forgot the business they were met about, and betook themselves to their prayers. This, added to the horror raised by the storm, looked very dismally ; insomuch, that my author, a man of no ordinary resolution and firmness of mind, confessed " it made a great impression on himself." But he told me, " That the Judge was not a whit affected, and was going on with the business of the court in his ordinary manner." From which he made this conclusion, " That his thoughts were so well fixed, that he believed if the world had been really to end, it would have given him no considerable disturbance."

But I shall now conclude all that I shall say concerning him, with what one of the greatest men of the profession of the law, sent me as an abstract of the character he had made of him, upon long observation, and much converse with him. It was sent me, that from thence, with the other materials, I might make such a representation of him to the world, as he indeed deserved, but I resolved not to shred it out in parcels, but to set it down entirely as it was sent me, hoping, that as the reader will be much delighted with it, so the noble person that sent it, will not be offended with me for keeping it entire, and setting it in the best light I could. It begins abruptly, being designed to supply the defects of others, from whom I had earlier and more copious informations.

" He would never be brought to discourse on public matters in private conversation ; but in questions of law,

“ when any lawyer put a case to him, he was very commu-
“ nicative, especially while he was at the bar ; but when he
“ came to the bench, he grew more reserved, and would ne-
“ ver suffer his opinion in any case to be known till he was
“ obliged to declare it judicially ; and he concealed his opi-
“ nion in great cases so carefully, that the rest of the Judges
“ in the same court could never perceive it. His reason
“ was, because every Judge ought to give sentence accord-
“ ing to his own persuasion and conscience, and not to be
“ swayed by any respect or deference to another man’s opi-
“ nion ; and by this means it hath happened sometimes,
“ that when all the Barons of the Exchequer had delivered
“ their opinions, and agreed in their reasons and arguments,
“ yet he coming to speak last, and differing in judgment
“ from them, hath expressed himself with so much weight
“ and solidity, that the Barons have immediately retracted
“ their votes, and concurred with him. He hath sat as a
“ Judge in all the courts of law, and in two of them as chief,
“ but still wherever he sat, all business of consequence fol-
“ lowed him, and no man was content to sit down by the
“ judgment of any other court, till the case were brought
“ before him, to see whether he were of the same mind ; and
“ his opinion being once known, men readily acquiesced in
“ it ; and it was very rarely seen, that any man attempted
“ to bring it about again, and he that did so, did it upon
“ great disadvantages, and was always looked upon as a
“ very contentious person ; so that what Cicero says of
“ Brutus, did very often happen to him : *Etiam quos con-*
“ *tra statuit æquos placatosque dimisit.*

“ Nor did men reverence his judgment and opinion in
“ courts of law only ; but his authority was as great in
“ courts of equity, and the same respect and submission
“ was paid to him there too ; and this appeared not only in
“ his own court of equity in the Exchequer Chamber, but
“ in the Chancery too ; for thither he was often called to

“ advise and assist the Lord Chancellor, or Lord Keeper
“ for the time being, and if the cause were of difficult ex-
“ mination, or intricated and entangled with variety of set-
“ tlements, no man ever shewed a more clear and discern-
“ ing judgment: If it were of great value, and great persons
“ interested in it, no man ever shewed greater courage and
“ integrity in laying aside all respect of persons. When he
“ came to deliver his opinion, he always put his discourse
“ into such a method, that one part of it gave light to the
“ other, and where the proceedings of chancery might prove
“ inconvenient to the subject, he never spared to observe
“ and reprove them: And from his observations and dis-
“ courses, the chancery hath taken occasion to establish
“ many of those rules by which it governs itself at this day.

“ He looked upon equity as a part of the common law,
“ and one of the grounds of it; and therefore, as near as
“ he could, he always reduced it to certain rules and prin-
“ ciples, that men might study it as a science, and not think
“ the administration of it had any thing arbitrary in it.
“ Thus eminent was this man in every station, and into what
“ court soever he was called, he quickly made it appear,
“ that he deserved the chief seat there.

“ As great a lawyer as he was, he could never suffer the
“ strictness of law to prevail against conscience. As great
“ a chancellor as he was, he would make use of all the nice-
“ ties and subtleties in law when it tended to support right
“ and equity. But nothing was more admirable in him
“ than his patience: He did not affect the reputation of
“ quickness and dispatch, by a hasty and captious hearing of
“ the counsel; but he would bear with the meanest, and
“ gave every man his full scope, thinking it much better to
“ lose time than patience. In summing up an evidence to
“ a jury, he would always require the bar to interrupt him,
“ if he mistook, and to put him in mind of it, if he forgot
“ the least circumstance; some judges have been disturbed

“ at this as a rudeness, which he always looked upon as a
“ service and respect done to him.

“ His whole life was nothing else but a continual course
“ of labor and industry, and when he could borrow any
“ time from the public service, it was wholly employed in
“ philosophical or divine meditations ; and even that was a
“ public service too, as it has proved ; for it has occasioned
“ his writing such treatises as are become the most choice
“ entertainment of wise and good men, and the world has
“ reason to wish that more of them were printed. He that
“ considers the active part of his life, and with what unwea-
“ ried diligence and application of mind he dispatched all
“ men’s business which came under his care, will wonder
“ how he could find any time for contemplation : and who-
“ ever considers the various studies he past through, and
“ the many collections and observations he has made, may
“ as justly wonder how he could find any time for action :
“ But no man can wonder at the exemplary piety and inno-
“ cence of such a life so spent as this was ; wherein as he
“ was careful to avoid every idle word, so it is manifest
“ he never spent an idle day. They who come far short of
“ this great man will be apt to think that this is a panegyric,
“ which indeed is a history, and but a little part of that his-
“ tory which was with great truth to be related of him—
“ Men who despair of attaining such perfection, are not wil-
“ ling to believe that any man else ever arrived at such a
“ height.

“ He was the greatest lawyer of the age, and might have
“ had what practice he pleased ; but though he most con-
“ scientiously affected the labors of his profession, yet at the
“ same time, he despised the gain of it ; and of those pro-
“ fits which he would allow himself to receive, he always
“ set a part a tenth penny for the poor, which he ever dis-
“ pensed with that secrecy, that they who were relieved sel-
“ dom or never knew their benefactor. He took more pains

“ to avoid the honours and preferments of the gown, than
“ others do to compass them. His modesty was beyond
“ all example ; for where some men, who never attained to
“ half his knowledge, have been puffed up with a high conceit of themselves and have affected all occasions of raising their own esteem by depreciating other men ; he, on the contrary, was the most obliging man that ever practised. If a young gentleman happened to be retained to argue a point in law, where he was on the contrary side, he would very often mend the objections when he came to repeat them, and always commended the gentleman if there were room for it ; and one good word of his was of more advantage to a young man, than all the favor of the court could be.”

SIR ROBERT RAYMOND's OPINION

On a Case sent from Virginia in 1722.

John Hallows, late of Rochdale, in the county palatine of Lancaster, was seized of 2400 acres of land in Virginia, and died so seized, leaving issue, Restitute his daughter and heir. Restitute Hallows entered and intermarried with one Whiston, and by him had issue Restitute, her daughter and heir, and died seized. Restitute Whiston entered and intermarried with one Thomas Steel, and by him had issue Thomas Steel, her eldest son and heir ; and afterwards intermarried with Manly, and had issue two sons by him, John and William Manly. And being a widow at her death, made her last will and testament in writing, bearing date the 30th day of January, 1687, in these words : “ I give and bequeath to my son Thomas Steel, that tract of land I now live on (the land in dispute) to him and his heirs forever. Item, it is my will, that my three children, with their

“ estates, remain in the hands of my Executor till they shall
“ become of the age of sixteen years, and then to have their
“ estates.” And the same day made her codicil in these
words : “ It is my will, that if my son Thomas Steel die
“ in his minority, before he be of age to enjoy my within
“ mentioned land, that then my other two sons, John and
“ William Manly shall have the said land equally to be di-
“ vided between them and their heirs forever.” Thomas
Steel, at his age of 16, entered into the lands and took the
profits thereof, and lived till he had almost attained his age
of twenty-one, and died without issue ; after whose death,
John Manly entered into the lands and died in possession,
leaving issue the defendant. The lessor of the plaintiff is
Samuel Hallows, son and heir of Matthew Hallows, who
was son and heir of Samuel Hallows, who was eldest brother
of the said John Hallows.

Query. What estate Thomas Steel had in those lands by
the will of his mother, and whether upon his dying before
21, though in possession, the lands should go to Manly ?
And if the lands shall remain over upon Thomas Steel’s dy-
ing before 21, how his issue could have inherited, if he had
had any ?

OPINION.

I am of opinion, that Thomas Steel, by virtue of the will
and codicil of his mother, Restitute Manly (taking it for
granted the will and codicil were duly executed according
to the laws of Virginia) took an estate in fee-simple, but
subject to the contingency of his dying in his minority, be-
fore he should be of age to enjoy the land devised ; and if
he died in his minority, before he should be of age to en-
joy it, then the land, by the codicil, was devised over to
John and William Manly, in fee as tenants in common, by
way of executory devise. Mr. Hallows’ title depends upon
the construction of those words in the codicil : “ If Thomas
“ Steel die in his minority, before he be of age to enjoy

“the land devised.” If by those words, Thomas Steel’s death before 21 is to be understood, Mr. Hallows will have no title, because Thomas Steel did die before his age of 21; and in that case, if Thomas Steel had had children, they could not have taken this estate; which is so hard a construction, that it cannot be imagined the mother intended it should be so. But if those words in the codicil shall be referred to the words of the will, whereby, by the devise that the three children with the estates should remain in the hands of her executor till they should come of the age of 16 years, and that then they should have their estates, that that was the time of enjoyment intended by the codicil, then after Thomas Steel came to 16, he was seized in fee absolutely, and the executory devise over to John and William Manly could never arise, but Mr. Hallows as heir at law to Thomas Steel will be entitled to those lands.

If upon Thomas Steel’s coming into possession he had an absolute fee-simple in the lands, *Query*, Whether the lessor of the plaintiff had not a good title?

And I apprehend this last construction is the right construction, and is enforced by its obviating that hardship, in some measure, which the other construction would introduce, in relation to the defeating of the children of Thomas Steel; because it is not unreasonable to think that the mother did not intend her son should marry before 16, and if not, he could have no children to be defeated by the devise over. And therefore, upon the whole, if Mr. Hallows prove his pedigree plainly, I am of opinion he hath a good title to these lands devised.

ROBERT RAYMOND.

Lincoln’s Inn, March 28, 1772.

JURIDICAL SELECTIONS.

DR. CROKE'S JUDGMENT IN THE VICE ADMIRALTY

ON

BLOCKADES & LICENSES.

As this is the first case that has arisen on the American Blockades, I felt it my duty to give it the fullest consideration. I have examined scrupulously all its circumstances ; I have weighed attentively the arguments which have been advanced by the counsel on both sides ; I have searched out and have carefully applied to the present case, all the former decisions of the higher courts which I conceived to have any bearing or relation to it ; and I have now to make known to the suitors in this court the result of my enquiries.

The facts in this case are few and undisputed. The vessel having on board a cargo of flour and Indian meal, sailed from New-York on the 15th May, 1813, bound to Lisbon, under license from the British Secretary of State, bearing date upon the 11th of Sept. 1812, and which was comprised in these words :

“ To all Commanders of H. M. Ships of War and Privateers, and all
“ others whom it may concern—*Greeting :*

“ I, the undersigned, one of his Majesty's principal Secretaries of State, in pursuance of the authority given to
“ me by his Majesty, by order of council, under and by virtue of powers given to his Majesty by an act passed in the
“ year of his Majesty's reign, entitled “ An act to permit
“ goods secured in warehouses in the port of London to
“ be removed to the outports for exportation to any port of

“ Europe, for empowering his Majesty to direct that licenses
“ which his Majesty is authorised to make under his Sign
“ Manual, may be granted by one of the principal Secreta-
“ ries of State, and for enabling his majesty to permit the
“ exportation of goods in vessels of less burthen than are
“ now allowed by law, during the present hostilities, and
“ until one month after the signature of the preliminary
“ articles of peace,” and in pursuance of an order of coun-
“ cil hereunto annexed, I do hereby grant this license for
“ the purposes set forth in the said order in council, to
“ Cropper, Bender & Co. and others, and do hereby permit
“ a vessel being unarmed, and not less than 100 tons bur-
“ then, and bearing any flag except that of France, or except
“ a vessel belonging to France, or to the subjects thereof,
“ or to the subjects of any territory, town or place annexed
“ to or forming part of France, to import into the port of
“ Lisbon, from any port of the United States of America, a
“ cargo of rice, grain, meal or flour, without any molesta-
“ tion on account of any hostilities that may exist between
“ his Majesty and the said United States of America, not-
“ withstanding the said cargo and ship aforesaid may be the
“ property of any citizen or inhabitant of the said States, or
“ to whomsoever the said property may belong, and that the
“ master of said vessel shall be permitted to receive his freight
“ and return with his vessel and crew to any port not block-
“ aded, upon condition that the name and tonnage of the ves-
“ sel, and the name of the master of the said vessel, shall be
“ endorsed on this license at the time of the vessel’s clearance
“ from her port of lading. This license to remain in force
“ for nine months from the date hereof. Given at White-
“ hall, the 11th September, 1813, in the 52 year of his Ma-
“ jesty’s reign. “ SIDMOUTH.”

It is admitted by the captors that the license is good in it-
self and that the terms of it have been complied with, but it
is alledged by them that the vessel and cargo are still liable

to condemnation, notwithstanding the license, for having broken the blockade of New-York.

There are two points, therefore, for consideration. The first is a question of fact, whether New-York was blockaded at the time the vessel sailed from thence. The second is a question of law, whether, supposing the blockade to be established, the license can protect the vessel from the consequences of coming out of that port during its continuance.

The master has sworn roundly "that he had no knowledge of the blockade." But there appears full proof that the *notification* of it, which was made by Lord Castlereagh by the authority of the Prince Regent, upon the 20th March, was at that time known at New-York. It is contained at full length in the Evening Post, a newspaper published in that city of the 6th May, and consequently nine days before the vessel sailed, and it is morally impossible that information of so important a nature to the mercantile inhabitants should not have been universally intercommunicated amongst them.

It has been argued by the captors that this notification alone establishes a blockade; that it being a public act, and proceeding from so high an authority, nothing more is required, and that it would constitute to all intents and purposes a blockade, even if there were no single vessel off the port; that the cases from which the contrary might be inferred were cases of notification from commanders in chief, and not by the public authority of the sovereign, and that in the blockade of the French coast it was never required that there should be any vessels stationed off the ports; that even if it were necessary to prove the fact of the ports being actually blockaded by ships of war, the capture of this and many other vessels is sufficient evidence of it.

It has always been held by the British courts of prize, that to constitute a blockade, two things were required—

that the ports in question should be invested by a force adequate to the purpose of preventing ingress and egress without imminent danger of capture, and that notice should be given of it to all the parties who were to be legally affected by it. The actual investment is absolutely essential to constitute this state, and as early as the West-India cases, it was decided by the Court of Appeals, "That a declaration, unsupported by the fact will not be sufficient to establish a blockade."—In this respect there is no difference whatever between a public and the most private notification. The object of both is the same, merely *to inform the party who is to be charged with the breach of the blockade, that a blockade exists.* A notification given by a commander is as much under the authority of the sovereign, as if it were an act immediately proceeding from him, because commanders derive from him the power of blockading such ports as they may judge proper. The most formal and diplomatic notification between governments is only meant for the information of individuals. Public notifications made to the government of a country will effect the inhabitants of that country with the knowledge of it for a certain time, as a presumption *juris et de jure*, because it is the duty of governments to communicate it to all their subjects—but, whenever it can be proved that any individuals are acquainted with the existence of the blockade, by any other means, the consequence will be to them the same. But under all modes of notification, it is absolutely necessary that there should be the fact of actual investment, without which no notification is effectual.

What has been called the blockade of the French coasts, by the well known order of the 26th of April, forms no exception to the principles maintained upon this subject by the British nation. That was a measure perfectly different from a blockade. It did not profess to be a blockade, but on the other hand the words of the order were "that those ports" "should be subject to the same restrictions as if the same

"were actually blockaded by his Majesty's naval forces in the most strict and rigorous manner." The word Blockade was introduced, not as a definition of the measure itself, but by way of explanation of the mode in which it was to be executed—in the manner of an actual blockade. No investment was even supposed to take place, because it was impossible that there could be an investment to the whole extent of the coast affected by the order. It was not, therefore a blockade, but it was a retaliatory measure to counteract the effects of an unjust and unlawful attempt to ruin this country by cutting off its resources. It was not directed against particular ports, but against the enemy's trade universally. It was a total prohibition of all commerce with the enemy, as he had prohibited all commerce with Great-Britain, and it would have been ineffectual and futile if it had not comprehended all the dominions of France, and if it had been limited within the legal boundaries of a blockade. As none of the rules of law relating to blockades were therefore applicable to those orders which militated against their design, so no inference whatever can be drawn from thence, that the laws of blockade, before admitted in the British courts, have been in any manner deviated from.

There is no necessity, therefore, to imagine with the counsel for the claimant, that those orders have been abandoned either in fact or in principle. They never have been in fact annulled. The supposed repeal was merely provisional, and the conditions not having been complied with by the American Government, they are still in force, as has been decided in this court in some recent cases.^a They can never be abandoned in principle till this proposition is admitted to be true, that "it is the duty of a nation to submit to the annihilation of its commerce and resources, when it is attempted by its enemy, with a view to its final subjugation and destruction, without an effort of struggle or resistance, be-

^a The Marquis de Someruelos—the George—and the Phœbe.

“ cause that resistance may be some inconvenience to a third “ country.” Our enemies, both open and in disguise, naturally are vehement in their outcries against the orders in council, because they have proved too successful in defeating their malevolent designs ; but, as long as the right of self-defence shall continue to be the first law of nature and of nations, so long will those retaliating and defensive measures rest upon the solid foundation of eternal truth and justice.

It is necessary then to establish in this case, besides a notification brought home to the knowledge of the parties, which has been sufficiently proved, that a blockade *de facto* existed. It is indeed to be supposed from the notification itself, that orders would be given to carry the intended blockade into effect. Yet this is not so conclusive as to carry with it a presumption that it has been actually done. It was argued by the captor’s counsel, that even if the high officer who has the supreme command on this side the Atlantic, should refuse to execute the order, that the court would be bound to execute it and to enforce the law. But this is not a true state of the case. If it were possible that an officer should be guilty of a great breach of duty in not observing orders sent to him by government, still though he might be personally responsible for the neglect, yet that would not supply the want of the fact that a real blockade had taken place. It has been held in the High Court of Admiralty, that, even where there was an actual investment, if any of the blockading ships have not enforced it, the blockade is so far “ virtually relaxed.” There is no evidence that the port of New-York has ever yet been in a state of blockade. It is not known as a matter of notoriety, or from the capture of vessels. There is no special evidence of it afforded by this case. No vessels were seen off the port. The capture was made in the latitude of 40 degrees and in the long. of 70 deg. and 20 min. by the prize-master’s affidavit, at the distance therefore of nearly 150 miles from New-York. There is no cir-

circumstances, therefore to lead us to a conclusion that the port of New-York was in a state of blockade. Where the existence of a blockade has been generally known and continued for some time, and by public notification, it is presumed *prima facie* to continue till it is revoked. In such case, when a blockade has really existed, it has been held to be incumbent on the party alledging the relaxation to prove it. But in the present instance, where it is not known that any blockade has commenced, I think it fair that the party who is to have the benefit of the blockade should establish it by evidence. If the case, therefore, depends upon that fact, I should direct the captors to bring further proof of it, and should allow the claimants at the same time to bring such other evidence as they may judge proper upon the point.

This, however, will be unnecessary, if it should be found that, notwithstanding a blockade, this ship and cargo was protected by the license; which brings me to the consideration of the second point in the case. This licence is dated on the 11th Sept. 1812, and the question is, whether it is annulled by the subsequent order for blockading the port of New-York, as far as that or any other blockaded ports are concerned—or, in other words, whether, under license to import goods from any port in the United States, they can be exported from a blockaded port in that country. I have examined all the cases to be found, which at all relate to this question. A recent case, that of the *Byfield*, Foster,^a was the case of a vessel which was said to have had a license granted to certain British merchants, permitting a vessel to proceed from *any port in the Baltic* to any port in the United Kingdom.

The vessel went into Copenhagen, then blockaded, and came out with her cargo with which she was sailing to Liverpool, when she was captured. It was laid down most

^a 1st Edwards, 188.

strongly by Sir William Scott, that "a licence expressed in
 " general terms, to authorise a ship to sail from any port
 " with a cargo, will not authorise her to sail from a block-
 " aded port with a cargo taken in there; to exempt a block-
 " aded port from the restrictions incident to a state of block-
 " ade, it must be *specially designated with such exemption*
 " *in the licence; otherwise a blockaded port shall be taken as*
 " *an exception to the general description in the licence.*"—
 Nothing can be laid down more forcibly and generally than
 this doctrine. Yet it seems that there may be *exceptions* to
 it. In the *Hoffnung Berens*,^b *without any such exception in*
the licence, where it had been granted on the same day when
 the notification stated the blockade to commence, the learn-
 ed Judge "laid all question of blockade out of the case, for
 " he thought himself bound to presume, that *it was intend-*
 " *ed* the parties should have the full benefit of importing
 " the articles without molestation from a blockade which
 " could not have been unknown to the great personage under
 " whose authority the licence was issued."

Another ground of exception was taken and admitted in
 the same case; for the Judge concluded, that "since the
 " blockade was not considered as a ground for withholding
 " these licences, he was led to suppose, that it was not *in-*
 " *tended* to have the effect of suspending such as had already
 " been granted."

In the case first cited, where the general doctrine was laid
 down so universally, but which must be so understood with
 some little reference to the particular case in which it was
 stated, it was said, that "as the vessel was lying at Christi-
 " ansand, an open port, at the time when the licence bore
 " date, and there was then no intention manifested of going
 " to Copenhagen, the licence could not be of a nature to pro-
 " hibit the purchase of a cargo there, a transaction which
 " was not in contemplation when the application was made,"

^b Rob. 2. 182.

so referring for an explanation of the licence to the intention of the government. It may then, from these three instances, be fairly inferred, as the judicial opinion of that great man, that notwithstanding there is no express provision in a licence or a blockading order to that effect, yet wherever it appears to have been *the intention* of his Majesty, or of those who exercise his authority, that the permission given by a licence should not be suspended by an order of blockade, that it is not affected by the blockades.

But before I consider the application of these principles to the present case, it must be observed, that there is *in limine* a very material distinction between them. All these cases, were of licences granted to British subjects or neutrals, and the blockades were of ports belonging to third nations, our enemies. This is the case of a licence granted to the enemy, and the blockade is of his own ports. These are such material circumstances, that the other cases cannot in any manner be considered as directly applicable to the present. For the truth is, that a blockade is not a measure that legally affects the enemy at all. It operates, in point of law, only upon neutrals. Upon them it has a real legal effect. It gives new rights to the blockaders—without it, neutrals might trade in safety to the port. It is the blockade alone which creates the right of capturing their vessels. But the vessels and the other property of the enemy would be equally liable to be captured and condemned, although a single blockade should never be established. It is indeed a disposal of naval forces which renders the capture of his property more easy to the blockading ships, and which distresses him by excluding neutrals, but this is all. As to the enemy's property, the blockaders acquire no new right by it. Before a blockade is established, they can seize and confiscate the enemy's property wherever they find it, and during a blockade they can do no more. It affects the enemy *de facto*, and not *de jure*. That a blockade affects merely neutrals, is evident from the form of notification. This is

conceived always nearly in the same words. It is signified to the ministers of neutral powers, and it informs them "that measures will be adopted which are authorised by the law of nations, and the respective treaties between his Majesty and the different neutral powers." The instructions to the blockading vessels; by which the blockade is established, are to stop all neutral vessels destined to, or coming "out of the respective ports." No notification is made to the enemy; no instructions are given relative to the capture of his property, because it requires no special directions. Since, then, no orders are given to the blockaders respecting his property, it is left precisely as it was before the blockade; that is, liable to be captured generally, unless where it is particularly protected by orders from the British government, or other peculiar circumstances. Since the orders to the blockading ships specify, and relate only to neutral vessels, they cannot authorise the capture of enemies vessels, though protected by a licence, which are not neutral vessels, although to ascertain their general rights and duties, they have sometimes been considered in that light, in the way of analogy, and of a partial similitude, which does not hold good in every respect, but which might be estimated from the nature and object of the special protection so granted, and of the document by which it is conferred. Since a blockade creates no right of capturing enemy's property which did not before exist; if this general right of capturing his property has been suspended by a licence, I do not see how it can be revived or renewed by a blockade, or how the cruisers can acquire from the blockade, a right to capture the enemy's property in a case where that right had been superceded by the act of his own government.

Neither does the object of the present blockade at all interfere with that of the licence; but on the contrary, they are independent of each other, and both consistent. That

of the blockade is to distress the trade of the enemy, but the design of the licence is not to assist the trade of the enemy, or for the accommodation of any of the merchants of that country, but to relieve our own wants, and to promote an important and interesting service. If it was an object with the British government to victual our troops in Spain, that object is not affected by the blockade. It is equally necessary that the soldiers should be fed, whether New-York is blockaded or not.

Adopting from British and neutral cases, the principle that the effect of licences is to be deduced from the intention of the British government, as far as it can be ascertained from circumstances, let us endeavour to discover what must have been its intention with respect to these licences. I have just observed that the object of them was, for the benefit of the British Military Service. The armies employed in the cause of liberty, were starving in Spain. Most of the ports of Europe were shut against British vessels. It was necessary to have recourse to the U. States, as long as those necessities continued which these licences were intended to remedy, it must be supposed to be the intention of government that the supply should be continued. The existence of these licences themselves, unexpired and unrevoked, is *prima facie* presumptive evidence that those articles are still wanted, till that presumption is overruled by a declaration to the contrary. In the next place, though the licence is general and extends to any port in America, yet in fact, the blockaded ports of the Chesapeake, and the other southern ports of America, are the only ports from which flour and corn can be expected. The northern countries of the United States do not grow enough for their own consumption, and are supplied from the southern ports. If government wishes therefore to be supplied at all, it is only from the blockaded ports that it can receive the supply.

Some evidence of their intention may be deduced from the form of the licence. It says that "these articles may be imported from any port of the United States without molestation on account of any hostilities which may exist between his Majesty and the United States of America." It might not be overstraining the expressions to interpret the words "any hostilities," to mean "notwithstanding any mode of hostilities which Great-Britain may think proper to employ, whether by blockade or otherwise." It is true, that the blockade was not established till many months after the date of the licence, but it was not improbable in the contemplation of the British government. To carry on the war against that country by blockading their ports, has always been a general and favorite idea. Something of the consideration of blockade must have been present in the mind of those who drew up this order in council, because it is thus mentioned: "The master of the said vessel shall be permitted to receive his freight and return with his vessel and crew, to any port not blockaded." It seems to have been understood and intended, that the licence could and should protect the master against breaking a blockade, or why else should it have been thought necessary to prohibit his return to a blockaded port? Understanding the licences, then, to have been a protection from the penalties of blockade-breaking, though they do not forbid coming out of and exporting the articles described, from a blockaded port, it is a fair conclusion then, that this was not intended to be prohibited. The reason of the distinction, as it is to be deduced from the present existing circumstances, and which were probably foreseen when the licence was granted; on the grounds which I have just stated, is evident it was only by coming out of a blockaded port that the licence could be executed, and its object accomplished, because the provisions to be imported to Lisbon could only there be procured.

It may reasonably be doubted, whether by a license of this nature, a kind of vested interest is not conferred upon the grantee, of which he cannot be deprived capriciously, at the mere will of the granting nation; or at least, whether he can be dispossessed of it without an express declaration of the government by which it was granted. Since it is a privilege which is to protect the property of the enemy, and for the benefit of the country which grants it, not only the interest, but the good faith and honour of the country are implicated and pledged to respect them. They ought not to be revoked without full and timely notice. Adverse considerations ought not to be pressed too rigorously against them, but they should be supported by the most liberal interpretation. In case of doubt, the balance should incline with their favour; it is a contract for the benefit of one party in which the British government says, in fact, "If you will import provisions to the army in Portugal, we will protect your vessels from capture;" when the Americans are performing their part of the contract, it would be a trap to turn round upon them and tell them that the protection is without any previous notice having been explicitly given to that effect. In point of prudence, by allowing the validity of these licenses, little mischief can be done. As they were limited to nine months, they have now all nearly expired, since it is understood that none have been issued since the beginning of October. The object of the blockade will not be defeated by allowing them. The departure of half a dozen flour ships will not materially relieve the distressed commerce of the United States, but the intercepting of them may be injurious to the British service in the Peninsula, and may be considered as not very creditable to the liberality and good faith of G. Britain. By restoring this property, therefore, I conceive that this court will but maintain the justice, the honor and the policy of the country.

Such is the view which I have been enabled to take of this subject. It were to be wished that public documents upon which the important interests of many individuals depend, should be clear and definite in their language, that nothing should be left to supposition, and that either in the license it should be explicitly stated, that the exportation might or might not be made from a blockaded port; or, that in the order for the blockade, it should have been declared whether it was to extend to licensed vessels. If this had been done we should not have been driven to the necessity of divining meanings and intentions. Parties, including captors and claimants, commanders and merchants, would not be placed in a state of doubt and anxiety, and this court would be relieved from the painful duty too often imposed upon it of making its way amongst various difficulties, and opposite obligations, frequently with no other guide than probability and conjecture. If the parties are not satisfied with the decision of this court, it is competent to them to apply to the superior tribunal, where the instructions and objects of his Majesty's government are known *a priori*, and not left to be determined by hazard and distant reasoning.

JUDGMENT OF SIR WILLIAM SCOTT

IN A PRIZE CAUSE.

This was the case of the *Hope*, and three other American vessels, captured in December last, in the prosecution of a voyage to Spain and Portugal with cargoes of provisions. A claim was given by the owners, on the ground of the vessels being exonerated from the character of hostility, and protected from condemnation, by having on board letters from Mr. Allen, the British Consul at New-York, and Admiral Sawyer, commander on that station, purporting to li-

cence them for a voyage, and intended as a safe-guard and protection to them throughout it. A variety of objections were urged at length by the captor's counsel to the nature and extent of the protection deducible from these documents, and the cases stood for the decision of the court this day, upon the validity of these objections.

Sir William Scott observed, it was difficult to give any precise designation to the letters which, it was contended, furnished the protection in these cases ; a great part of the previous correspondence being left out of sight, the court was left to guess at the contents ; it was therefore only fair to infer, that it contained a proposition to Admiral Sawyer, that the business should take the course it since had. It was perfectly clear, that there must have been such a proposition, from the evidence of the subsequent facts. The papers could not, abstractedly, be considered as affording any protection, those who gave them not being invested with a competent authority to that effect. Exemptions from the consequences of hostility, are amongst the highest acts of power ; they are the acts of the Sovereign alone, and must flow directly from him, or those in official situations under him. It was not to be contended, that Mr. Allen, the Vice-Consul, was clothed with this authority in the present case ; and an Admiral, though he may have a considerable power with respect to the forces under him, cannot grant an exemption of this nature beyond the limits of his own command. The only question, therefore, was, whether there has not since been an act of the state, ratifying those acts which the law calls spurious ; whether, in fact, the government has not given them an authority they did not possess ? It appears, that Mr. Foster had been in the habit of granting licenses of this sort ever since the order of the British government, of October 14, 1812, and that he had been authorized, or recognized, in so doing, by order. Thus the policy of the measure, and the mode of adopting it, had both been sanctioned by the British government, when Mr. Foster retired

from the country, and the transaction then assumed the present shape, certainly an awkward one, and not entirely trusted to by the Americans themselves. The direct course, however, cannot always be adopted; difficulties will occur to prevent it; and the court saw no reason to presume that under the difficulties which extended in the present cases, the course adopted by Mr. Allen and Admiral Sawyer might not be the best. It had been said that Admiral Sawyer might have granted them personally and sent them to America by way of Halifax; but there may not perhaps have been any safe and direct communication. Mr. Allen appears to have acted with every degree of fairness in the four instances, which gave rise to the present question; and as the measure is in substance precisely the same as that resorted to by Mr. Foster, varying only in its form, that informality could not be a fatal objection to the principle of the measure itself, as recognized by the order of the 26th of October, 1812. Taking the whole of the cases therefore together, he was of opinion that they clearly came within the meaning of the orders in council. He would ask, if the documents produced were not of the nature of certificates and passports, what were they?—mere nullities; and the order would be inoperative. He had therefore no hesitation in decreeing restitution of the ships and cargoes; but as the captors were justified in their detention under all the circumstances, it must be subject to the payment of their expenses.

JUDGE DAVIS'S OPINION ON THE LICENCE TRADE.

MASSACHUSETTS DISTRICT COURT.

This vessel, laden with flour and bread, sailed from Baltimore for Lisbon, on or about the 24th September last, and on the 15th of October was captured by the Thorn, and bro't into the port of Marblehead. The vessel is not entitled to

register, but is duly documented as the property of Griffiths, the claimant, by a certificate from the collector's office at Baltimore, dated June 24, 1811. Among the ship's papers, delivered to the captors, there was no document specifying the owners of the cargo. The supercargo, in his examination before the commissioners at Marblehead, on the third of November, declares the cargo (excepting 100 barrels of bread, the master's adventure) to be the property of several shippers at Baltimore, whose names he could not recollect, though he says he had received from them letters of instruction. The master, on his examination, No. 14, declares the property to be as it is claimed, naming all the shippers, as they now appear to be evidenced, excepting one, and states that he signed bills of lading to the several shippers. The omission of the name of one of the shippers, in the master's evidence, is believed to be inadvertent, as the bills of lading were not in his possession. Four days after his examination, the supercargo delivered to the commissioners a bill of lading and invoice of the whole cargo, excepting the master's adventure. By those documents, Samuel C. Griffiths appears the sole shipper, and his orders to the supercargo are annexed, directing him, on his arrival at Lisbon, to dispose of the cargo, and to remit the proceeds to the shipper's correspondents in Liverpool, in England. The master also had written orders from Griffiths, the owner of the vessel, to make sale of her at Lisbon, if any advantageous offer should be made, and to remit the amount to England. By the affidavit of claim for the lading, made by the supercargo, it is stated, that only 28 barrels of flour belong to Griffiths; that the residue belongs to the other claimants in different proportions; that a separate bill of lading and invoice was made out for each shipper excepting Griffiths; and that the master also signed a bill of lading for the whole of the cargo as the property of Griffiths; that all the separate invoices and bills of lading, with the instructions of the respective shippers, were deposited with Griffiths for safe-

keeping, the supercargo having first taken extracts for his guidance in relation to the disposal of the cargo : that the general bill of lading, with an invoice and letter of instructions from Griffiths, purporting the whole to be his property, were delivered to the supercargo at the time of sailing, and were on board at the time of capture. In explanation of this arrangement it is stated, that it was thought adviseable to have but few papers on board, in order to prevent embarrassment and delay, in case the vessel should be taken on her passage and carried into any foreign port. An objection was made to the admission of the papers delivered to the commissioners, by the supercargo, after the examination, but it was waved, and those papers were admitted by consent.

Among the papers found on board, was a license or protection, being a certified copy of a letter from Admiral Sawyer to Andrew Allen, Esq. late British Consul at Boston, and an additional protection or letter of safe-conduct from Mr. Allen. The vessel being found sailing with these instruments, appears to have been the cause of capture and bringing in, though other additional grounds for condemnation have been alledged and urged on the trial, particularly the destination of the proceeds of sale of vessel and cargo, and the papers on board, and the preparatory examination. Exceptions were made to the testimony of the master and supercargo, in some particulars, which were supposed to render further proof inadmissible. The omission to disclose the invoice, bill of lading and orders abovementioned, on the examination, is not indeed explained to our entire satisfaction, especially on the part of the supercargo, to whom these papers were committed : and it must appear in a degree strange, that the supercargo should not be able on his examination to recollect and name the shippers whose property was committed to his management, and of whose instructions, though not then in his possession, he has taken minutes. I notice the explanations that have been offered. The omission as

to the invoice and bill of lading, whatever may have been its character, whether voluntary or inadvertent, was speedily repaired by a delivery of the papers in question to the Commissioners; and I do not find the exceptions to the evidence of such a description as to justify a peremptory conclusion against the owners, and to preclude an opportunity for further proof in support of their asserted claims. That proof has been produced, together with proof relative to the manner in which the license was procured. The evidence presented fully establishes the property to be as claimed, and supports the account given in the affidavit of claim, by the supercargo, as to the ownership and arrangement relative to this voyage. The reason given for the simulation of papers, which corresponds with that given by the supercargo, I must admit to be real, though I must add, that the proposed advantage does not appear of sufficient importance to require such a disguise. It has had the common effect of such simulations, to perplex the enquiry and give a dubious character to the transaction. I know that to a limited extent there is an indulgence to such disguises in courts of admiralty, if the cause be explained to the satisfaction of the court, especially if intended to relieve from difficulties imposed by the restriction of an enemy, and not originating in views to avoid or defraud the regulations of the country of the owners. The worst effect of such disguises, and it is a very serious one, is their liability to induce an adherence to papers on oath, by what has been denominated *ship morality*, too often widely different from that genuine morality which is the basis of confidence and the great cement and support of social security and order.

Having permitted these claims to be verified by further proof, the real state of facts relative to the voyage is clearly evidenced in every material circumstance. The vessel and cargo are wholly owned by citizens of the United States; the destination was for Lisbon, and the cargo was there to

be sold on account and risque of the owners, the proceeds to be remitted to England. The destination was a lawful one. And it was contended that the claims should be rejected, and the vessel and cargo condemned to the captors: 1. On account of the British protection or license; 2. For the destination of the proceeds, or the directions relative to the remittance, which are said to be in violation of the law of war and the allegiance of the persons concerned in the voyage. These questions are novel and important—No express authority is produced by which they can be determined. There are no statute provisions on the subject, and it has fallen to my lot to examine the principles, to trace and estimate the analogies urged or suggested as a ground of decision. This investigation has been pursued with diverted attention to other causes necessarily requiring a determination.

In regard to both the questions, it is obvious that the considerations by which they are to be governed have reference merely to the rights and duties of a citizen in regard to his own country in a state of war. How the transaction would be viewed by the laws of nations, if the vessel had been captured by a ship of another belligerent with whom G. Britain is at war, makes no part of the present inquiry. The license, as it is called, is composed of three papers—a copy of a letter from Admiral Sawyer, dated at Halifax, Aug. 5, 1812; Mr. Allen's certificate annexed to and authenticating the copy, dated at Boston, Sept. 15, and another certificate from the same gentleman of the same date, addressed to all officers of His Britannic Majesty's ships of war, or of privateers belonging to his subjects.

It is contended that these papers stamp a hostile character on this vessel and voyage, which is unsurmountable and fatal; that the American character of the vessel and adventure is forfeited by an association with enemies, and by being voluntarily placed under the protection of the enemy's

armed force, and it is further contended that the possession of such licence is evidence of an illegal commercial intercourse with enemies, and of enemies' interest in the concern, or of a subserviency to the views of the enemy, in violation of the duties of the citizen and of his allegiance.

What shall constitute a hostile character, is sufficiently well determined in many instances, which are strongly marked. One characteristic is the sailing under the *flag and pass* of the enemy. This is conclusive as to the character of the ship, and is a complete bar to the claims of an asserted neutral proprietor [5 Rob. 13. *Amer. edition.*] If assumed by a subject of the capturing belligerent, it would be equally conclusive as to goods, and would be decisive against the admission of any claim. In giving judgment on a case of this description, in relation to the Dutch flag and pass, assumed by a neutral, Sir W. Scott observes that ships have a peculiar character impressed upon them by the special nature of their documents with which they are so invested, to the exclusion of any claims of interest that persons living in neutral countries may actually have in them. In the same case, he makes a distinction, however, between such a complete adoption of the hostile character, and a pass or license for a particular purpose, relative to the enemy's trade, without an alteration of the neutral character of the ship. The counsel for the claimants, in the case of the *Vrow Elizabeth*, cited the case of the *Clarissa*, in which the American owner obtained restitution of his share of the ship, though the vessel had sailed from Holland under a special pass or license from the authority of that country, to engage in the colonial trade. In that case, says Sir W. Scott, the ship had merely a colonial pass or license, being in all other respects undoubtedly and avowedly an American ship, and described as such in the usual American documents. The distinction is applicable in the present case. The ship and cargo, which are clearly American property, are documented as such; the

papers from the officers of the British Government also recognize her as such, and are merely intended to exempt the property from capture by the enemy's cruizers. The arrangement is an unusual one, and we have no express precedent by which to determine its legal operation. Exceptions from capture have sometimes been made by belligerents from motives of humanity, as in the case of fishing vessels, and at one time, when Spain was at war with Great-Britain and distressed by famine, in favor of vessels bound with grain to that country. Anciently, the Admiral of France had the power of forming fishing truces or of granting passports to individuals to continue their fishing or trade unmolested.—It is not contended, that a vessel taking the benefit of these indulgences would be considered as offending, though in the instance of the French passports to fishing vessels, they were occasionally given to individual vessels, and did not operate by a general order or decree. In the present case, it was not competent for Admiral Sawyer to give a general security against all the cruizers of his country, but he declares that he shall give directions to the commanders of the squadron under his command, not to molest American vessels unarmed and laden with flour and dry provisions, *bona fide* bound to Portuguese or Spanish ports, whose papers shall be accompanied with a certified copy of his letter, under the consular seal of Mr. Allen. This is the mode adopted to notify the cruising ships of the Admiral's instructions. If he had selected another method, and had published his instructions in the Gazette at Halifax, it surely could be no offence against the duties of a good citizen bound on a lawful voyage, to take with him one of the British newspapers containing such instructions, as a security on such lawful voyage, not prohibited by the laws of his country. A certified copy of the letter, by a known officer, has, as it appears to me, no other legal effect or operation. Mr. Allen's consular powers may indeed have terminated by the war, though his residence in the country was permitted, and I shall not undertake to de-

side on the propriety of his signing in that capacity. It was probably considered as a mode which would give greater security to the holders of the instrument and render it less liable to exception or doubt from the enemy's cruizers. In this view, it was rendered more valuable to the holders, and the procedure is entitled to candid consideration; at any rate I cannot consider it as giving a vicious taint to the transaction, so as to subject the citizen receiving such a document to process of condemnation from the authorities of his country, which are to decide upon the operation of the paper.—Mr. Allen aims to bestow a more extensive security than what is given by Admiral Sawyer; but it is, as it necessarily must have been, merely advisory. It is addressed to the officers of all the ships of war of his country, public or private.

The views and intentions manifested by these officers in these papers, have been particularly urged in argument. It is said, that they fully express purposes favorable to the enemy, and that the acceptance of papers with such indications implies a voluntary subserviency to British interests. In whatever terms these papers had been drawn, no one could suppose that they were granted from mere good will to this country; and if that had been asserted, it could have deceived no one. In fact, whether expressed or not, the state of things presented a case in which there was a coincidence of interests. When this trade was left open, after the declaration of war, it must have been understood, that Great-Britain would feel an interest in its prosecution. This could not but have been perceived and considered, when the act of the 6th July last, relative to *trading with the enemies of the United States* was passed. The subsequent relaxation of the rights of war and of capture, on the part of the enemy, relative to such trade, only present a more decided manifestation of the estimated importance of the trade to G. Britain. It still is a legal and innocent trade to our citizens, until

prohibited by statute ; nor do I conceive that the expressions in the papers should subject the citizen to the imputation of intending the promotion of the views of the enemy ; he has his own interest in view, and so far as any public considerations enter into the enterprise, he ought to be considered as favoring the views and interests of the country, who have left the trade open under a full contemplation of the state of the country and of the world politically and commercially. On the face of the instruments, therefore, and viewing their whole tenor, I consider them not as conclusive against the claimants who are the holders of them. But the relaxation is not universal, and from the very nature of partial exemptions they are liable to a degree of suspicion—though not in themselves absolutely vicious, they may become so by the manner in which they were obtained, or the conditions on which they were granted, I have therefore, in this case and another of similar description (the schooner *Hero*) required further proof on this head, and the order for further proof is limited to the claimants, according to the general rule in prize cases, 3, Rob. 267, Amer. Edit.

By the proof that has been produced relative to the license in this case, it appears to have been purchased of a citizen of the United States, an inhabitant of Virginia, at the rate of one dollar per barrel for what the vessel would carry ; that part of the consideration was paid in cash, the remainder to be paid on arrival of the vessel in Lisbon ; that the license was in blank, and the person procuring the license declares on oath, his belief that the seller had no knowledge of, or concern with Mr. Allen, by whom the license was issued. It is further testified, that such licenses are a common article of sale in Baltimore and other places. On this evidence, I cannot conclude that any enemy interests are involved in the transaction, or that the terms on which the license was obtained, render it a vicious transaction, operating the forfeiture of the property intended

to have been protected. The act of July 6th prohibits, under heavy penalties, the receiving, accepting, or taking "a license from the Government of Great-Britain, or any officer thereof, for leave to carry any merchandize, or send any vessel to any port or place within the dominions of Great-Britain, or to trade with such port or place." The mere receipt and acceptance of a license, or security from capture, in a lawful trade to neutral countries, is not prohibited. If not procured on terms involving enemy's interests, I cannot find the rule of law which renders the vessel and cargo liable to condemnation in our courts, for being possessed of such an instrument of protection. I am sensible that the practice may be liable to abuse. It is capable of being converted into a monopoly, or the practice may have political bearings of serious import. This liability to abuse renders it, as I conceive, the duty of the court to require such proof of the manner of procuring the license, and of the terms and conditions, as shall enable it to form an opinion as to the fair and legal operation of the procedure. I am not convinced, from the evidence in this case, that the transaction relative to this license, will subject the property claimed to condemnation. There may be considerations relative to the practice, of dubious aspect, which it belongs to the government to estimate, and to make such provisions as the public interest shall appear to require.

The other ground of objection, is the direction to invest the proceeds of vessel and cargo in bills of exchange, to be remitted to England. The directions for the sale of the vessel are not absolute; it was to depend on the contingency of receiving an advantageous offer—if sold, however, the proceeds are directed to be remitted to England. Some of the shippers direct the investment to be made in government bills, meaning, it is admitted, the bills of the English government. Others direct a remittance generally. As to the captain's adventure, it does not appear in what manner

it was his intention to dispose of the proceeds. Now if this property was intended merely to be landed at Lisbon, and to be afterwards transhipped to the enemy's country, it would clearly be a trading with the enemy, and, such intention being manifested, it would be liable to condemnation, if captured in any stage of the voyage (the *Jonge Pieter*, 4 Rob. 65). But I am by no means satisfied, that the orders given in this case, as to remittance of proceeds, would, if executed, be of like legal operation. To produce a conclusion of such serious consequences to the owners of the property, I ought to be assured, that there would be no mode of effecting the proposed remittances without implicating the claimants in the culpability of trade with the enemy. Now it is observable, that all the cases, and they are numerous, which have been cited from the books, respecting trade with the enemy, relate to tangible objects, capable of actual use for the purposes of life, *i. e.* to goods and merchandize bound to or from the enemy's country. Of this description are all the instances cited in the case of the *Hoop* (1 Rob. 165, Am. ed.) in which the law on this subject is fully displayed and illustrated. I do not mean to infer, that other transactions would not constitute the trade with an enemy. It certainly may be committed by going to, or coming from an enemy's country with a vessel without a cargo. But no case has been produced, though the attention of the able and learned counsel for the captors was specially directed to the enquiry, in which the usual operations of the exchange were considered as of this character. In fact, by an analysis of those operations, it will appear, that a substantial difference exists, in regard to aid to an enemy, between a trade in commodities, and what is called a remittance. If a citizen should convey commodities to an enemy's country, he affords him palpable aid, and the act is illegal. But if he should purchase of a fellow citizen, or of a neutral, a debt or demand against a subject of the enemy country, he renders no benefit to the enemy, there is only a change of the

creditor. If the remittance be to pay a debt, the enemy country is indeed a gainer to the amount of the debt. How a remittance for such a purpose in time of war should be considered, it is not necessary here to enquire. The remittances in this case were specially intended as a deposit, until there should be an opportunity to withdraw the amount.

It is decided, that a subject of one belligerent may lawfully purchase of a neutral, goods or vessels lying in a port of the opposing belligerent. The trade, in such case, is with the neutral, and the locality of the objects purchased, does not vitiate the transaction (4 Rob. 233, Am. ed. Chitty's Law of Nations 15). From this authority I should infer, that the supercargo, on his voyage, might lawfully purchase of a subject of Portugal, his debt or demand on England, or in other words, his bill of exchange on England. But it is observed, that according to the direction of some of the shippers, the investment was to be made in government bills. Such an investment, it is urged, would be particularly noxious, having a tendency to sustain the credit, and give additional value to the enemy's papers. So far as such direction may be evidence of an intent of a commercial dealing relative to this cargo, or any portion of it, with *subjects of the enemy*, it is pertinent. But I do not consider it warrantable for me to make that inference, without more direct evidence. Government bills, as they are termed, it is affirmed, and I presume the fact is so, are in the market, bought and sold like other articles. A *bona fide* purchase of an English bill, of a neutral, would not place the party, on legal ground, in a different situation from the purchase of the bill of an individual. It would be otherwise, if the neutral were the mere agent to procure such government bills from the British holder.

It cannot be denied, that investments in government bills would have a tendency to enhance the value of those bills in the market. This indirect effect, however, of the opera-

tion, would not, as appears to me, render it criminal. By the laws of war, we are not to benefit an enemy; on the contrary, according to Bynkershock, *vetatur quoquo modo hostium utilitati consulere*. We are not to consult the benefit of the enemy, and of course, that trade and those operations are, by the law of war, illegal, which, from their character, imply such a motive. But such is the connection of human affairs, which national conflicts cannot altogether dissolve, that many operations may have an indirect effect to benefit the enemy, and yet the law of war has not considered them embraced within its maxims of prohibition. If, for instance, the proceeds of the numerous shipments to Spain and Portugal from this country, should be invested in British goods, it would undoubtedly aid the enemy, by the encouragement given to its manufactures, and, in a degree, to its commerce. Still such purchases would be lawful to our citizens, if made *bona fide* of a neutral owner of such goods, and the goods thus purchased might be lawfully transported to any other neutral country. The mere law of war, indeed, would not prohibit the importation of goods, so purchased, even to our own country. It is our law of non-importation, made before the war, which has this operation.

If such investment be not illegal, I am not satisfied, that evidence of the debt, thus purchased of a neutral, might not be transmitted from the neutral country, without coming within the legal idea of trade with an enemy, as developed and illustrated by the cases which have been decided. It was, for a long time, lawful in England to insure enemies' property, and such was the common practice in that country, in former wars with France. Valin, as Marshall observes, in language bordering a little on derision, remarks on the impolicy of such a rule of law, which was peculiar to England, and suggests the benefit derived from it by France. But we find no intimation, that the procurement of such in-

insurance in England, by a subject of France, was illegal, nor is it made subject to any animadversion; and yet such insurance could not have been effected without a correspondence. So when in England, in the modern trials upon policies of this description, the foreign holder of the policy has been held not entitled to recover, the objection has not been made, even in argument, that the creation of the policy, which would necessarily involve a degree of communication with the enemy. If, therefore, it were now lawful in England, to insure enemies property, it would not, as appears to me, come within the idea of trade with the enemy for a citizen of this country to procure such insurance, though it could not be accomplished without a communication, direct or indirect, with that country. The same reason would apply to the mere transmission of the evidence of a debt or demand on an enemies country, lawfully acquired.

I acknowledge the general obligation of bringing every correspondence with the enemy under the cognizance of the government. A correspondence, intrinsically innocent, may be culpable from a non-conformity with regulations, calculated to assure the government, that nothing injurious is to be apprehended from any proposed communication. It would be reasonable, however, to expect a promulgation of such regulations, that every one might be secure from dangerous inadvertence. Besides, as the government has a public agent in Lisbon, and the charge in this case rests on intention, I ought not to conclude that any correspondence, which the proposed remittance of bills to be purchased might require, would not be submitted to his inspection.

In speaking of the doctrine of insurance on enemies' property, as it formerly stood, I cannot omit to notice its application to the first objection in this case, grounded on the license from an enemy. The reasons which have led the courts of law in Great-Britain, ultimately, to decide against the validity of such insurances, after long practice to the

contrary, might cause that country to be dissatisfied with these indulgences granted by its officers ; and for the reasons which induced France not to discountenance or disapprove of the procurement of insurances in England, in time of war, between the two countries, may we conclude as to the innocence of obtaining these licenses or protections, if tainted with no improper contract or conditions.

Such are the views which I have taken on this subject. In contemplating the questions on which the cause depends, and in searching for just inferences from acknowledged principles, and from analogous determinations, I should not be surprised if my conclusions should be found erroneous ; in which case, they will be corrected by a superior tribunal, if the captors should be dissatisfied. I decree restitution to the claimants ; but I do not think the captors should sustain the costs of bringing the case to adjudication, especially as further proof was requisite, and the obvious facts might induce the course pursued by the captors, consistently with sincere and honest conviction, that their procedure was justifiable. I therefore direct the payment of their necessary expences.

ARGUMENT & JUDGMENT ON THE LICENSE TRADE.

RHODE-ISLAND DISTRICT COURT.

A novel and highly interesting question was lately argued before the District Court of the United States holden by his Honor Judge Howell, in the case of a libel against the ship *Aurora* of Newburyport, prize to the privateer Governor Tomkins, of New York, found sailing under a British license. The principal documents produced on the part of the libellants were—a consular copy of a letter from Admiral Sawyer, commanding on the Halifax station, re-

ferring to a previous correspondence between the Admiral and Andrew Allen, jr. British consul at Boston, on the subject of supplies from America, reciting the necessity and policy of maintaining a constant supply of provisions from America to the British West-India Islands, with assurances to the consul, that his majesty's vessels of war would be directed to permit to pass, and fully protect all American vessels so laden and bound, and which should have on board the pass or license of the consul, with a copy of the Admiral's letter authenticated by the consul at Boston with such authenticated copy annexed; also, a pass of the consul from Newburyport to Norfolk, where the Aurora was to take in her cargo for the West-Indies.—The official papers stated the intention to be, a supply of the British West-India Islands, although the ship's papers purported a voyage to a neutral port. There was some other matter connected with this cause, but the above evidence founded the point most interesting to the community. We present a statement of the case, more from the magnitude of the legal question, than a wish to make it the subject of mere party discussion; but at the same time we think it a duty incumbent on every American most pointedly to reprobate a practice, so manifestly criminal and injurious to the country.

In the opening of the case, John Woodward, esq. a distinguished counsellor from the state of New-York, occupied nearly eight hours in a series of the most cogent and connected arguments, during no moment of which period was the attention of the court or audience suspended. What peculiarly distinguished this gentleman's reasoning was, that he urged no position or doctrines which he did not support by the production of some principle of the law of nations, or some decision founded on that law. It cannot be expected that we should from memory precisely state the whole of Mr. W's very ingenious and truly legal disquisitions, which extorted the most respectful approbation of the bench, and the admiration of the auditory. As a prelimina-

ry ground, he clearly established, that the statutory forfeitures of Congress had no bearing on the case, excepting so far forth as a binding municipal regulation was auxiliary to the provisions of international law. His main proposition was, "That obtaining from an authorised agent of Great Britain, paying for, sailing under, and exhibiting upon the high seas, as protection for the voyage, a British licence of pass and trade, by an American citizen, without permission of his own government, the two countries being at war, are in themselves cause of capture and condemnation, as a prize of war." To support this proposition, a variety of grounds were taken, among which were—That licences were factitious and not a part of the law of nations; but the creatures 1st of prerogative, and that confined to municipal regulation, or 2d of compact, or 3d of parliamentary provision. That the licenses in question were against the nature and law of war, as they put it in the power of particular individuals to relax or abate the rigor of the war; against the obligation of allegiance; and that the stipulations of licences could not be enforced by any known law:—That the obtention and possession of those licences of pass and supply, and the sailing under them, knowing of the war, was a trading with the enemy, independent of the port of destination and of the right of property which may be the subject of such trade: That the case of a licence to trade to a citizen or subject from his own sovereign was distinct from that of a license to a citizen or subject of one of the belligerents from the enemy, without the sanction of his own government; and so would be the supposed case of the neutral, for no question like the present could arise between the neutral citizen or subject and his own nation, as that nation would not be a party to the war; and the description of rights here involved would not in that case be in question.

"The question said Mr. W. whether the property be American or British, matters not, provided the indirect

or direct trading with the enemy be established. If you use your property so as commercially to benefit and carry into effect the prescribed and stipulated commercial views of the enemy, and under a formal license of protection or supply, this is as much trading with the enemy as if the subject of the trade were the property of the enemy, and the destination an enemy's port. In the latter case you trade direct—in the former indirect. If a different doctrine prevailed, national right would be at the shrine of the meanest artifice. But, continued he, if you pay the enemy for such licence, the case is still stronger, as the transit of the medium of commerce stamps a commercial character upon the transaction, and upon this light alone converts it into a supply. As to the locality in the inception of this transaction, Mr. W. said, it is the known legal rule of construction, that its deleterious character is communicated to the ship, the cargo and the voyage, for which the transaction is intended to provide, and which are described on the face of the licences."

In the close of his very able and luminous brief, Mr. W. observed, that "Much as to the interpretation and application of the rules of the law of nations will depend upon the character of the war in which we are engaged. The war of the U. States with Britain, is a war between two maritim and commercial nations in support of an independent commerce. The rules of decision which have applied the law of nations to the conduct of the citizens of each belligerent, have always been so construed and applied as to effectuate the notorious and avowed policy of the war. And more particularly has this principle been enforced upon questions arising upon the conduct of a citizen of one of the belligerents of his own nation, which is the present case. To trade with, or hold a commercial intercourse, whether by person or property, with the enemy, without the license of one's own government, is proven, by all the writers upon

the law of nations, and all decisions touching this point so adverse to the policy of a war waged for the purpose of commerce—that it amounts to a misdemeanor, and is cause of confiscation and condemnation. Suppose our citizens be permitted thus to obtain, pay for, and act upon those licences : They would be in the practice of all the evils and derangements which the law of war is intended to prevent.— They would facilitate treacherous correspondence, information and supplies to the enemy, the very evils assigned for the prohibition of commercial intercourse ; or, in the language of Sir William Scott, (in the case of the *Jonge Pietre*) “ all communication, direct or indirect, without the licence of government with the enemy. The anomaly of a citizen at peace and his nation at war, would emphatically exist : nay—the absurdity of that citizen making his peace and fortune by the disposition of the enemy, obtained adversely, to that of his own government. It is also easy to perceive, that by those licences it would be in the enemy’s power to destroy or counteract the internal commercial policy and relations of the states, or politically to distract the union, by concentrating the trade into some particular State, or casting it into the hands of a particular party. It is the language of a finished civilian, that “ there is no such thing as a war for arms and a peace for commerce.”

“ If we silently permit our citizens to traverse the ocean under such licences, Mr. W. added, it has already been proven that we enable the enemy to take by stealth a portion of our national sovereignty ; and if this high principle of national honor thus bear the touch, it would be better to surrender the whole. In a commercial war, which is always preventive and restrictive, by such licences the enemy would assume the right of regulating the commerce and directing the capital of our own citizens : The independence and integrity of one of the belligerents would be lost in the dependance and prospects of its citizens or sub-

jects upon the authority or courtesy of the other. The civic relation, the national pride, and the boasted morals of our countrymen, would be corrupted or destroyed by the deleterious influence of foreign gain, and that distinguished and repellant point of character which marks the American citizen, both at home and abroad, and which now stamps our national character upon the fears and admiration of the world, would be found at the feet of our enemy, or lost in the mazes of British corruption."

The District Attorney was about to reply, when the Court pronounced judgment of condemnation for the reasons urged by Mr. Woodward.

EVANS vs. ROBINSON.

(Action on the case for the Infringement of a Patent Right.)

CIRCUIT COURT OF MARYLAND.

The following brief statement was furnished to Mr. Oliver Evans, by his counsel for the purpose of exhibiting to the committee of Congress appointed on the subject of his patent right. The Hon. Judge Duvall, in his testimony before the committee of the Senate of the United States, confirmed it; and has observed that he did not consider the representation so full in favor of Mr. Evans as the evidence warranted:

At the last (November) term of the Circuit Court of the United States, Baltimore, several actions came to trial, which had been brought by Oliver Evans, against different persons for infringing his patent right, by using his mill machinery without his permission.

The millers near Baltimore, with the Ellicotts and Tysons at their head, made a common cause with the defendants. The defence set up was that Evans was not the original inventor of the machines for which he had obtained the patent. To support this defence, witnesses were summoned from various and distant places, particularly from the neighborhood of Christiana, in the State of Delaware, where Evans resided at the time when, as he alledges, the invention took place. The causes were twice continued, on the application of the defendants to give them an opportunity of procuring the attendance of all their witnesses. All did attend at the trial.

The machines in question, were the conveyor, the elevator and the hopperboy. Evans's patent included others, but they are not in general used by the defendants. As to the conveyor, the proof was that Jonathan Ellicott, previous to the invention of Oliver Evans, had invented and used a machine something like the conveyor of Evans; but it was proved on the part of Evans, that his conveyor differed essentially from that of Ellicott, was an improvement on it, and was much better adapted to the purpose to which Evans applied it. It was also proved that Ellicott had never applied his machine to that purpose, until the application was made and practised by Evans; who, consequently, not only improved the machine in a new and useful manner, but invented a new and useful application of it when so improved: making, thereby, a new and useful improvement in the art of manufacturing flour.

The elevator came next in question. Here the defendant gave evidence of various hydraulic machines, something resembling an elevator, that had formerly been used in Europe (or proposed to be used) for raising water; but it appeared that none of those machines had ever been applied to the raising of meal or grain, or were fit for that purpose. The elevator of Mr. Evans was essentially different and a great

improvement, which not only applied for this new purpose in the manufacture of flour, but was extremely useful for that purpose. They then produced a miller from the state of Delaware, of the name of Stroud, who after Evans told him grain and flour might be raised by a machine, did in fact make an elevator similar to that of Evans, though not complete. But Stroud declares he never should have thought of it but for the information he received from Evans ; and it was proved, on the part of Evans, that he invented his elevator and made a complete model of it, before Stroud's was made. On this head, Stroud was so well satisfied that he purchased a license from Evans to use his elevator together with his other improvements.

As to the hopperboy—The defendant gave evidence that some millers in Delaware, of the name of Marshall, having heard of Evans's discoveries, which were kept concealed, invented and attempted to use a very imperfect machine for the purpose to which Evans applied his hopperboy. But the Marshalls, who were produced as witnesses, proved that their machine did not answer the purpose, on account of several essential defects in its principle and construction, and that as soon as that of Evans, which was very different and very complete, made its appearance, they adopted it by license from him, and threw aside their own. All these machines were admirably combined in an original and useful manner by the patentee.

The defendants, thus defeated on the evidence, next attacked the case on the construction and even the constitutionality of the act of Congress ; but the Court, composed of Mr. Duvall, a Judge of the Supreme Court, and Mr. Houston the District Judge, decided against them on every point.—They then gave up the defence, and confined all their evidence to the mitigation of damages. The Jury found a verdict of \$1850 for the plaintiff in the first case, who declined demanding the treble damages allowed by law. The de-

endants in all the subsequent cases which came to trial, to the number of four, confined themselves entirely to excuses in mitigation of damages. In all the cases, there were verdicts for the plaintiff, with ample damage : which gave universal satisfaction.

The special act of Congress, it will be observed, under which the patent in controversy was granted, gives a right of action against such only as have used, since its passage, or may hereafter use the machines, without having purchased license therefor. All who paid under the former defective patent are expressly protected ; nor can there be any recovery for using the machines prior to the present patent, even without having paid for them. The special act is not retrospective in its operation, or in the construction put upon it by the patentee and his counsel.

Evans, to shew the utility as well as originality of his improvements, produced at the trial many respectable witnesses, and read the following certificate from the Messrs. Ellicotts, near Baltimore, the most skilful millwrights and experienced millers in this or any other part of the United States :

“ We do certify, that we have erected Mr. Evans’s new
 “ invented mode of elevating, conveying and cooling meal,
 “ &c. As far as we have experienced, we have found them
 “ to answer every valuable purpose, well worthy the attention
 “ of any person concerned in merchant, or even extensive
 “ country mills, who wishes to lessen the labor and expense
 “ of manufacturing wheat into flour.

“ JOHN ELLICOTT,
 “ JONATHAN ELLICOTT.
 “ GEORGE ELLICOTT.
 “ NATH. ELLICOTT.”

“ Ellicotts’ Mills, Baltimore County, Md.

“ August 4th, 1790.”

Respecting the utility of these machines and improvements, it was fully proved, that in a mill which can manu-

facture 20 bbls. of flour in a day, they save at least \$300 a year in labor alone ; that the operation is more perfectly performed, and with less waste ; that more work can be done by the same mill, and a larger proportion of superfine flour produced from a given quantity of wheat, equal to at least 50 cents gain to the miller on each barrel ; that the saving on the whole, in such a mill, upon the most moderate computation, amounts to \$1200 a year—probably much more ; and that no mill, without these improvements, can be employed in competition with such as have them.

“ We were counsel for Mr. Oliver Evans, in these cases,
 “ and have given this statement at his request. We certify
 “ it to be true, and have no doubt that the Judges who heard
 “ the cause, if applied to, will confirm it.

“ ROBERT G. HARPER.

“ NATHANIEL WILLIAMS.

“ Baltimore, January 6, 1813.

The following is the copy of a note addressed by William Pinkney, Esq. Attorney-General of the United States, one of Mr. Evans's counsel, to Mr. Williams :

“ Baltimore, January 12, 1813.

“ *Dear Sir*,—I find the statement signed by you and Mr,
 “ Harper, relating to the trials at the last session of the Circuit Court for Maryland, of Mr. Oliver Evans's cases, to
 “ be perfectly correct ; and you are at liberty to use this note
 “ as a proof of my entire concurrence in that statement.

“ I am, Dear Sir, &c.

“ WILLIAM PINKNEY.”

In the progress of this cause, the defendants' counsel contended before the Court, That the letters patent, granted in this case, were not conformably with the act of Congress passed for the plaintiff's relief : That the declaration did not correspond with the proof ; as in the construction of the defendant's counsel, the breach was alledged to consist in the use of machines ; whereas the patent comprehended the dis-

covery of principles, as well as machines : That the plaintiff was not entitled to a patent for the conveyor, inasmuch as J. Ellicott had previously invented a screw to mix flour, although the plaintiff's conveyor was differently constructed from Ellicott's and applied to different purposes : That the defendant was not liable to pay for using the machine in question, it having been erected before the passage of the special act, or the grant of letters patent to the plaintiff, and after the expiration of the former letters patent, when it was not unlawful to erect or use the same : And, lastly, that the act for Oliver Evans's relief was *ex post facto* ; that it impaired the obligation of contracts ; and was, therefore, unconstitutional—he having obtained letters patent, in 1790, for the same improvements, which had expired before the act aforesaid was passed ; it not altering the case, that the first patent was declared judicially to be null and void for defect of form.

The COURT (Judges Duvall and Houston) declared, That the letters patent in controversy were issued conformably to law : That the declaration was good and sufficient to maintain the plaintiff's case established in proof ; some of the counts alledging that the defendant used the patented improvements generally, and others, part of the improvements : That the plaintiff's conveyor, being a new and useful improvement on the continued spiral screw, and applied to a new and useful purpose, entitled him to a patent for his improved conveyor : That the second proviso in the act for Evans's relief, passed January 21, 1808, protected the defendant from any liability to pay damages for using the machinery without a license, previously to the granting of the license, but not for any subsequent use : And that, in the opinion of the Court, the act referred to is not an *ex post facto* law ; for that relates to criminal cases only : That it does not impair the the obligation of contracts, or interfere with any rights previously acquired by the community : That on the contrary, the Legislature has evinced its attention to in-

dividual rights, by exempting, in a special proviso, all persons, from the obligation to renew a license purchased under the former patent: That Congress have the exclusive right, by the Constitution, to limit the times for which a patent right shall be granted, and are not restrained from renewing a patent or prolonging the time of its continuance; more especially in the present case, where the patent granted in the first instance had been decided by judicial authority to be null and void, on account of some defect in the patent.

THE RIGHT OF SUFFRAGE.

The following important decision was lately rendered in the Virginia Court of Appeals, in the suit *Custis vs. Lane*, which depended on the following Case:

On the 15th of January, 1808, the General Assembly of this Commonwealth passed an act which recited that doubts had arisen as to the proper construction of the second section of the act entitled, "An act concerning the election of members of General Assembly," and "with a view of explaining the same," enacted "That no person inhabiting in the district of Columbia or elsewhere not within the jurisdiction of this commonwealth, shall be entitled to exercise the right of suffrage therein, except citizens thereof employed abroad in the service of the United States or of this commonwealth, and whose foreign residence is occasioned by such service."—On the 17th of April 1809, G. W. P. Custis, the appellant, who was born in Virginia, but resided within that part of the county of Fairfax, which is now comprehended within the district of Columbia, at the time of the separation from this Commonwealth, offered to vote at the election of the members of the General Assembly, for the said county of Fairfax, in

in virtue of a freehold held by him in that county. He was prohibited therefrom, by the appellee, the high Sheriff, under the provisions of the act above mentioned, and this action was brought against him therefor ; with a view as it is supposed, to settle the right of the inhabitants of that district, to vote within this Commonwealth, or in other words, to try the constitutionality of the said act.—The case was ably argued by Messrs. E. J. LEE and CALL for the Appellant, and by Mr. WIRT for the Appellee, and on the day first above mentioned, the following opinion, and resolution of the Court was delivered by Judge ROANE ; all the Judges being present except Judge CABELL.

OPINION.

This is an action on the case brought by the Appellant against the Appellee, as high Sheriff of the county of Fairfax, for refusing to permit him to vote in the election of members of the General Assembly. The case made by the Appellant in his declaration, is, that having been born within the Commonwealth of Virginia, and being resident in that part of the county of Fairfax, which now constitutes a part of the district of Columbia, at the time of its cession to the United States, he has continued to reside there ever since. The ground taken by the pleas of the Appellee, is, the general one taken by the act of January 15th, 1808 : namely, that the Appellant did not reside within this Commonwealth, but resided within the district of Columbia, aforesaid, at the time he offered to vote ; and that he did not come within the exception of that act, in favor of non-resident citizens who are employed in the service of the United States, or of this Commonwealth.—These pleas being demurred to, and issue joined thereon, judgment was rendered for the Appellee in the Court below, from which judgment an appeal was taken to this Court.

If these pleas should even be adjudged to be bad, yet upon the principle of going up to the first fault, judgment

would still be rendered against the Appellant, if on the case made by his declaration, he has no right to recover; and it is evident that his right may be much weaker under the declaration, than under the pleas, as the latter do not exclude (as the former does) the idea of his having been still a citizen of this Commonwealth, at the time he offered to vote. We infer this diversity, from its being stated in the declaration that the Appellant was inhabiting within the district of Columbia, at the time of its separation from this Commonwealth: he was consequently expatriated thereby from the government of Virginia.

The act of Virginia on the subject of expatriation, relates only to individual cases. It does not relate to those public and general acts of expatriation, by cession or otherwise, which are more or less incident to all governments and countries. With respect to the particular cession now in question, it was contemplated and provided for by the constitution of the United States—agreed to by the Commonwealth of Virginia, by its act tendering the territory to the General Government, and also by the Congress of the U. States, who accepted the cession. To all these acts the Appellant, by his representatives, was a party.—He has therefore no reason to complain, that he has been cut off from the dominion of Virginia, in consideration of, perhaps, adequate advantages. That he is no longer within the jurisdiction of the commonwealth of Virginia, is manifest from this consideration—that Congress are vested by the constitution, with exclusive power of legislation, over the territory in question; and it is only by the consent and courtesy of Congress, that any of the laws of Virginia have been permitted to operate therein. This last fact will be fully manifested by recurring to the several acts of Congress on the subject.—It follows that the district of Columbia, being without the laws of Virginia, is as to it, another and distinct jurisdiction, and that the Appellant is not merely

a citizen of Virginia, abiding or inhabiting therein, but passed with that territory from the jurisdiction of this Commonwealth by the act of cession, and owes no allegiance thereto.—It might well therefore be true, that the case made by the pleas, might be in favor of the Appellant, and yet that he is prohibited from recovering upon the weaker ground of claim admitted by his own declaration.

With respect to the right of a citizen or subject of a foreign government, to intermeddle with the civil policy of Virginia; and especially to exercise the all-important function of legislation, the matter cannot admit of a possible doubt. Such subjects or citizens cannot exercise this inestimable right, as they owe to the commonwealth no corresponding duties, and would not be amenable to the laws by them enacted. They cannot exercise this right in person, for their personal attendance may be necessary at the same time in their own country; and besides, in time of war, they would be prohibited from coming here for the purpose.

In some small democracies, the people have exercised the legislative power, in person; and this principle is not lost sight of, when, owing to the extent of the territory, or the numbers of the people, they are compelled to exercise that power by means of deputies. This necessity of acting by agents, does not change the principle; does not let in to the appointment of such deputies, persons, who but for the necessity aforesaid, would be inhibited from acting in their primary and original character. In other words, none are competent to legislate mediately, by their representatives, but those who would be admitted, but for the impediments aforesaid, to exercise the right in person.

It follows from these premises, that before this great principle shall be departed from, it ought at least manifestly to appear, from the act of government itself, that an exception has been explicitly assented to by the people: in a case in

any degree equivocal, the general principle would undoubtedly turn the scale.

There is no such exception to be found, in the constitution of this commonwealth.—That instrument and the declaration of rights on which it is based, has no eye towards the subjects of foreign powers. It only purports to declare the rights, and settle the duties of those who are parties to the compact. There is not only no such exception, in that instrument, but on the contrary, the converse is explicitly declared and expressed. The declaration of rights is stated to have been made by the representatives “of the good people of Virginia;” and it is declared that these rights “do pertain to THEM & their posterity, as the basis and foundation of government.”—This instrument, therefore, can never be construed to bestow the inestimable right of suffrage upon aliens and enemies, who have no “permanent common interest with or attachment to” this community; who owe paramount and conflicting duties to other sovereigns; who have superior attachments, in other countries; and who, from their residence elsewhere, cannot perform duties, which imply the necessity of a residence within this commonwealth. On the case made by the declaration, therefore, the Appellant is, clearly, not entitled to recover.

With respect to the ground supposed to be taken by the pleas, as aforesaid, while we are free to admit, that it is weaker for the Appellee than that made by the declaration which admits the Appellant to be no citizen, and leaves a great discretion to the officer, as to the fact of a foreign residence, we are of opinion that the provision of the act of 1808, in relation to it, is in conformance with the principles of the constitution. As the Constitution is to be construed, as aforesaid, only in reference to our own citizens, so such of them as are not embraced by its provisions, in favor of the right of suffrage, who, through absence, are disabled from performing the duties in question; through other ties of allegiance,

temporary or perpetual, are thrown into a scale conflicting with their duties and allegiance to this commonwealth; and whose foreign residence diminishes their former "common interest with and attachment to" *this* commonwealth.—Persons standing in this predicament, cannot be admitted to the right of suffrage, without running counter to all the principles on which that right is founded. As well might a resident-citizen claim to vote, after he had parted with that freehold, which guaranteed his attachment to the community.

In thus deciding against the right of the Appellant, upon the general principles just mentioned, the court is, by no means, disposed to admit, that that result would be varied by any of the legislative provisions, upon the subject. On the contrary, a recurrence to the various acts in our code, ancient and modern, will manifestly shew that they are in strict conformity herewith. On every ground therefore, the judgment of the court below is correct and ought to be affirmed.

In taking this view of the subject, the court has neither considered, nor decided the question, whether an action will lie against a sheriff, for refusing to receive the vote of a person duly qualified; and much less, has it decided, whether such action would lie against an officer, acting in obedience to a legislative act, found to be in conflict with the Constitution. While this last case can rarely be expected to occur, its importance would require the most serious and deliberate consideration; and even with respect to the first, it cannot often be expected to arise, under all the care which is taken by our constitution and laws, to define explicitly, the rights and qualifications of the electors. Whenever either question, however, shall occur, and become necessary to be decided, the court will not shrink from the investigation and decision thereof.

ADJUDGED CASES
IN THE
SUPREME COURT OF NORTH-CAROLINA.

JULY TERM, 1811.

Hollowell v. The Devisees of Pope.

The special verdict found that the bond declared upon is the act and deed of John Pope, the devisor of the defendants, and that they have lands by the devise sufficient to discharge the same : That the executors of John Pope did duly advertise the death of their testator according to the directions of the act of 1789 ; and that the plaintiff is and has been an inhabitant of the State ; and that the suit was not instituted within two years from the qualification of the executors :— And they also pray the advice of the Court, whether the plaintiff is barred from a recovery by the said act of 1789. If the said act is to be considered as extending to claims against heirs and devisees, they then find for the defendants ; but if the act is to be confined only to suits against executors and administrators, they then find for the plaintiff : And that the bond was not paid at or after the day.

The case was argued at a former term, by HARRIS for the plaintiffs, and GASTON for the defendant ; and now the opinion of the Court was delivered by

TAYLOR, C. J. It is very clear that the words of the act of 1789, c. 23, do not prescribe any time of limitation to suits brought against devisees ; nor can the Court, after an

attentive consideration of its equity and spirit discern any satisfactory ground upon which such a construction can be rested.

The creditors are required by the act to make demand within the time limited, against the executor or administrator, from whose qualification the period is computed; a provision necessarily implying that the claims must be of that description, which the representatives of the personal estate are, in the first instance, liable to pay; but where a creditor having a direct remedy, which he chuses to enforce against the heir or devisee, from a belief that the real fund is either more solvent, or more accessible than the personal one, it is difficult to imagine a reason why he should be compelled to make a demand of the executor or administrator; or why it is necessary for him to take notice of the time of their qualification.

The whole act relates, either to the proving wills and granting letters of administration, or to the recovery of such debts as are to be paid out of the personal estate; it points to the convenience of that class of creditors, and to the safety and protection of executors and administrators after a certain period, provided they perform specified duties, intended to apprise creditors of the death of the testator or intestate, and to secure the personal assets, so that they may be forthcoming to their demands. It is worthy of remark, that at the very same session, a law was passed, which, for the first time, rendered devisees liable to the payment of debts; so that had the Legislature designed to extend the limitation to them and heirs, they would probably have done so in express terms; and as the whole subject was then brought under view, as well the alteration of the law in such a material part, as the time of limitation prescribed by the act of 1715, the omission can scarcely be ascribed to inadvertence.

The act under consideration professes to supply the deficiency of the act of 1715; in which the limitation is expressed in terms essentially different. It fixes the death of the debtor as the period from which the time is to be computed; nor does it, like the act of 1789, require the demand to be made of the executor or administrator, thereby confining the operation of the law to such debts as they are liable to be sued for. From whom the demand is to be made must, under the act of 1715, be determined by the nature of the debt itself; it may be made of the heir, if he is liable by the nature of the contract; it may be made of the executor or administrator, if the creditor will not or cannot pursue the heir in the first instance. So that, in this view of the subject, there is no conflict between the two laws, which being intended to promote different objects, may well stand together. The act of 1715 was designed to protect the heir, and every part of the estate, from demands of whatsoever kind or nature; the act of 1789 was intended to protect the executor and administrator, from such demands as they alone are liable to in the first instance, or such as the creditor may elect to enforce against them.

That there should be a diversity of opinion as to the repeal of the act of 1715, between this Court and the Supreme Court of the United States, we cannot but regret; and if authority were a proper article on such a question, there is none to which we could submit with more pleasure, because we highly estimate the talents and integrity which adorn that bench. But the exposition and construction of the legislative acts of this State, will be sought for and expected in this tribunal by the citizens of the State, and we are bound to give that judgment which the best exercise of our own understandings will enable us to pronounce. Let there be judgment for the plaintiff.

Williams vs. Branson.

The Defendant, Skipper M'Call, contracted with the Plaintiff's Son and Agent, at Wilmington, to carry from that place to the town of Fayetteville, certain articles for which he gave the following receipt :

" Wilmington, 18th December, 1806."

" Received of Mr. Henry Williams, in good order and
" well conditioned, the following articles.—Which said arti-
" cles I promise to deliver to Messrs. Nesbit and Campbell
" at Fayetteville N. C. the dangers of the river only except-
" ed, they paying freight for the same as marked in the mar-
" gin.

" HUGH M'CALL "

One of the hogsheads of Sugar, mentioned in said Receipt, being larger than common, could not be got into the hold of the Boat, but was placed behind on the hatches, a place where Sugar is sometimes but not usually carried, except hogsheads of the above description : There was at the time a considerable fresh in the river, which was known (equally) to both parties. There stood on the bank of the river, about ten miles above Wilmington, a large cypress tree, part of which, or some of the limbs of which, leaned over the river, at this place the river made a bend, and in passing this tree, the stream being rapid the stern of the Boat was driven in towards the bank, and passed under one of the limbs of the tree, which forced the hogshead overboard together with the Skipper who was trying to save it.—The hogshead was lost. It appeared in evidence upon the trial of the cause, that the Skipper, after having deposited the other articles in his Boat, did not wish to receive this hogshead, on account of its size ; the plaintiff's agent replied, that if he carried any, he should carry all ; the Skipper then informed him, if the hogshead was taken, it must be placed upon the hatches ; and the plaintiff's agent knew that the said

hogshead was placed on the hatches because it could not be got into the hold of the Boat. It further appeared, that at the time the hogshead was forced overboard, the Boat was in the common way, and that this was the only way along which Boats could be got up the River in time of high water; and that Boats are got up the river by hooking and gigging, and whilst the hands were engaged in the bow of the Boat in hooking to the trees and limbs, which stood on the bank and stretched over the water, the rapidity of the current drove in the stern of the Boat under the limbs which forced the hogshead overboard. It further appeared, that this cypress tree is a well known tree, and was well known to the Skipper and crew of the said Boat. There appeared to be no neglect on the side of the Skipper and crew, except the circumstances before mentioned do constitute neglect in contemplation of law.

This action being brought to recover the value of the hogshead of sugar that was lost, and a verdict rendered for the defendant: It is submitted to the Supreme Court to decide whether the loss of the said hogshead of sugar, is attributable to one of those accounts that comes within the meaning of the expression in the receipt, "Dangers of the river, &c." If it be, then the rule for a new trial to be discharged; otherwise to be made absolute.

TAYLOR, C. J. If the loss of this property were occasioned by such an accident as came fairly within the scope of the exception contained in the bill of lading or receipt, then the defendant ought not to be responsible. Otherwise he must be chargeable upon every principle applicable to the duty of common carriers.

The expressions of that paper are "dangers of the river only excepted," and they signify the natural accidents incident to that navigation; not such as might have been avoided by the exercise of that discretion and foresight, which are expected from persons in such employment.

Nor indeed is every loss, proceeding even from a natural cause, to be considered as happening by a peril of the sea; for if a ship perish in consequence of striking against a rock or shallow, the circumstances, under which the event takes place, must be considered, in order to decide whether it happened by a peril of the sea or by the fault of the master. If the situation of the rock or shallow is generally known, and the ship not forced upon it by adverse winds or tempest, the loss is to be imputed to the fault of the master^a; or if the shallow were occasioned by a sudden and recent collection of sand in a place, where ships could before sail in safety; the loss is to be attributed to the act of God, or the perils of the sea.^b

Apply this principle to the case before us, and consider whether the circumstances under which the loss happened do not announce a degree of carelessness or temerity in the Skipper, that ought to render him responsible to the Plaintiff.

The force of the current in the time of a fresh, and the increased danger, thence arising from the cypress tree, were well known to the Skipper. He should not have adventured to pass the bend at such a time, without employing adequate precautions to obviate the danger, if indeed any precaution could have been sufficient. But on prosecuting that part of the voyage at such an unseasonable time, he took the risque upon himself. The state of the river, it is true, was equally known to the Plaintiff, but he neither knew the consequent hazard connected with this part of it, nor does it appear that he urged the departure of the Skipper in the face of such danger.

Here, then, was no tempest, no irresistible impulse of natural causes, but a fixed and well known danger which every man accustomed to the navigation would calculate upon

^a Abbot 169. ^b Abbot Ibid.

meeting, if he proceeded on the voyage at such a time, with only the usual number of hands. And even these, it appears, were all employed at the bow of the boat, whilst none were left in the stern to counteract the tendency of the current to force that part under the tree. Thus, in the case of *Amis v. Stephens*,^a where the plaintiffs put goods on board the defendant's hoy, which sunk in consequence of a sudden gust of wind as she came through a bridge, the court held the defendant not liable, as the accident was occasioned by the act of God; but they said, if the defendant had ventured to shoot the bridge, if the general bent of the weather had been tempestuous, he would have been liable.—The court thinks, upon the whole case, there ought to be a new trial.

JULY TERM, 1811.

Nichols v. Newsom.

This was an action of trover for a quantity of lightwood set as a tar-kiln on the defendant's land, without being banked or turfed. A judgment was obtained against the defendant, on which execution issued, and was levied on the said lightwood, which was duly advertised and sold, and struck off to the plaintiff as the highest bidder. The plaintiff afterwards applied to the defendant for liberty to bank, turf and burn the kiln, as it then stood, which the said defendant refused to grant. The plaintiff then demanded the lightwood, and proposed to bring his team and cart it off the defendant's land; whereupon the defendant replied, if the plaintiff came on his premises for that purpose, he would sue him.

It is admitted that there was no evidence at the trial of an actual conversion, but that the kiln remained in the same situation it was when purchased by the plaintiff, and had never been touched or interfered with by the defendant.

Upon the facts above stated, the plaintiff was permitted to take a verdict for \$20, the value of the tar-kiln, with leave to the defendant to have the verdict set aside, and non-suit entered, provided the court should be of opinion, the plaintiff was not entitled to recover in this action on the foregoing facts; and, on motion of the defendant for that purpose, the case is transmitted, by order of the Court, to the Supreme Court.

SEAWELL, J. In order to support an action of trover, it is necessary for the plaintiff to prove property and right of possession in himself, and a conversion by the defendant. It is admitted in this case that the plaintiff has shewn property and possession in himself; but it is insisted by the defendant, that he has committed no conversion.

This leads to an enquiry what a conversion is? By conversion, *convertio*, I understand where one person wrongfully turns to his use the personal goods of another, or does any wrongful act, inconsistent or in opposition with the right of the owner. It is, in short, a malfeasance, and the plea is not guilty. Now this malfeasance, like all others, is capable of proof in divers ways, as by the confession of defendant, or when called upon to surrender he refuses, the refusal affords a presumption that he has converted it to his own use, otherwise he would not refuse. But this presumption, like all others, vanishes when the contrary appears.

In the present case, the plaintiff calls upon the defendant for permission to dig earth and cover the kiln, the defendant refuses; this it is said is no conversion, the defendant having a right to do so. The plaintiff then formally asks a

permission which the law had already afforded him, and which defendant could not abridge or withhold, which defendant also refuses ; and threatens a suit in case of his entry, and there is no doubt but the parties were under a belief, that it was in law necessary to obtain such permission, to prevent the plaintiff from becoming a Trespasser.

This menace, though perfectly a shadow, is said amounts to a conversion. That it is the policy of the law to do away the necessity the plaintiff was reduced to, of taking his property at the risk of a suit, though without foundation, and in which the plaintiff would necessarily fail, and when defendant would have his costs accorded, and for the bringing which causeless suit, the law would give no action.— However stupid the conduct of the defendant in this action has been ; yet, when it is recollected that in legal understanding, conversion is an act, and that in all instances where the words of a party are given in evidence, they are with a view of inferring such act, it would seem irresistably to follow, that where there is clear evidence no act has been done, that it is equally as clear there has been no conversion. What has the plaintiff a right to complain of ? Has the defendant injured his property ? Has he used it in any manner, or exercised any act of ownership inconsistent with the plaintiff's right ? He has not, but has threatened to sue the plaintiff if he took it away ; and it is admitted on all hands no such action would lie. How then does this differ from a case where one individual says to another, if you plan your own house, eat your own mutton, I will sue you for it. Here the owner exercises these acts at the same risk, and yet it would hardly be said, this menace was a conversion.

But a case has been cited from 3 Mod. 170, where in trover for a tree, upon demand and refusal, plaintiff recovered. When that case is examined, it will turn out to be this : That it was for fourteen lemon trees in boxes, which were placed by the plaintiff in the garden of Lord Brude-

nell by the Lord's consent. The Lord afterwards sold, and the garden passing through several owners, came to the defendant, who refused to deliver them to the plaintiff upon request.

Now these trees were placed in a garden which was walled, and which plaintiff could not enter without defendant would open the gate, and as for the trees they must necessarily be brought out by the gate.

The defendant there was guilty of withholding from the plaintiff the enjoyment of his fruit-trees. It is to be noticed that the conversion was not made a point in the case. In the present case, the lightwood was as accessible to the plaintiff as defendant, and has not in any manner been withheld from him.

In 5 Bac. Ab. 279, title *Honour*, it is stated, that demand and refusal of a piece of timber, or other cumbersome article, when it has remained untouched, will not support an action of trover. Independently of this authority, from the reason of the case, I should hold such action would not lie. Consequently, I am of opinion, that the plaintiff cannot, in this case, recover, and that the rule for a new trial should be absolute.

LOWRIE, J. The action of trover is the legal remedy to recover damages for the unlawful conversion of a personal chattel. The lightwood, the subject of the present action, is a personal chattel. The levy and sale of the officer were legal, and the purchase and payment of the money by the plaintiff vested in him the property of the lightwood. The article, however, being bulky and too cumbrous to be immediately moved from the land of the defendant, on which it was sold, the law will presume, unless by some express and unequivocal act of the debtor such presumption should be destroyed, that it was left there by his consent, and in his

possession, until the necessary arrangement could be made for taking it away. I think that in all cases, where the consent of one man becomes necessary, and without which another cannot conveniently enjoy his property, the law presumes such consent to be given, unless the contrary expressly appears. Whenever, therefore, a man purchases heavy articles at a sheriff's sale, as corn, fodder, hay-stacks, and such like, which it is not presumable he is prepared instantaneously to carry them away with him, he may, if not prohibited by the debtor, return in a peaceable manner, and lawfully enter upon the freehold, or into the inclosure of said debtor, or other person, on whose land such articles were, for the purpose of moving his property. But I am of opinion that such presumption of law ceased to exist, as regarded the parties to this cause, the moment the defendant expressly prohibited the plaintiff from entering upon his freehold, and threatened him with a suit at law, in case he did enter.

After such express prohibition, the entry of the plaintiff could not be a peaceable and lawful one. It is believed there is no case where the law has tolerated one man to enter upon the possession of another for the assertion of a mere private right which he may have to a piece of personal property, against the express prohibition of him in possession; such toleration would be attended with consequences very injurious to society.

I therefore think that the refusal, &c. as stated in this case of the defendant, was such evidence of a conversion as was proper to be left to a jury. The conduct of the defendant reduced the plaintiff to the necessity of asserting his right by an action at law, as he has done. "If a man give leave to have trees put into his garden, and afterwards refuse to let the owner take them, it will be a conversion."—*Com. Dig. Action on the case, Trover (E.) p. 314.*

This case differs from that to be found in Gilbert's Law of Evidence, 262; and in 5th Ba. Abr. 257, Trover (B)—where there was a refusal to deliver a beam of timber, which might be attended with some expence and trouble; for here was not only a refusal to deliver, but a refusal to suffer the plaintiff to take the lightwood into his possession and cart it away, and also a declaration that if he, the plaintiff, entered upon his freehold for the purpose of doing so, he would sue him.

I am, therefore of opinion, the plaintiff was under no necessity, circumstanced as the case was, to enter upon the defendant's land against his will, and thereby incur a lawsuit, and all the trouble and expence incident thereto; that, on the contrary, he has taken the legal course, and is well entitled to judgment.

HALL J.—The lightwood which is the subject matter of this action, was legally levied upon and sold to the plaintiff. That sale gave the plaintiff a title to it. Now, in its nature, it could not be delivered and carried away, as most other kinds of personal property could. It was cumbersome, and could only be carried away in the manner proposed by the plaintiff. If so, he had a right to carry it away in that manner, and the defendant was not exercising a right that belonged to him, when he forbid him to do so; of course, the plaintiff's right was not thereby impaired; his physical power to do himself justice still remained. Had that been opposed, then indeed there would have been a conversion. Suppose the defendant had sued the plaintiff for carrying away the lightwood, he could not have recovered, because the plaintiff only did that which the law gave him a right to do; that was, to enter on the defendant's land, and carry away property to which he had acquired a legal title, and which could be disposed of in no other way. Then the defendant used threats towards the plaintiff, of no legal significance, and which he ought not to have regarded. Had

the lightwood been within the defendant's inclosures, and admittance had been denied, the case might have been different. But being in the woods, and no barrier interposed but empty threats, I think there was no conversion, and that Judgment should be entered for the defendant.

TAYLOR, C. J.—I cannot discern any reason why a plaintiff suing for this sort of property, should be tied up to a greater degree of strictness in his proofs, than would be required from him, were he suing for a slave or any other chattel. In ordinary cases, a court and jury would be satisfied with proofs, that the plaintiff's property in the defendant's possession, had been refused on demand; and it would seem an anomalous proceeding, to call upon the plaintiff to shew that he had endeavoured to take possession of his property, notwithstanding an explicit refusal by the defendant to deliver it, accompanied by a threat that he would harrass the plaintiff with a suit, if the property were removed.

Has not the effect of the defendant's conduct been to deprive the plaintiff of the just exercise of the rights of ownership in the property sued for? The impression naturally made on the plaintiff's mind was, that he could not, without molestation from his adversary, take his own property into his own possession; and I cannot think it would have relieved him greatly to be told, that after a tedious and anxious defence to a law-suit, his adversary would have all the costs to pay. It is true, that the common language of the books is, that a demand and refusal, is presumptive evidence of a conversion; but I believe it may be assumed as a safe position, that it is in all cases conclusive evidence, where the defendant had the property in his possession, and detained it without right. Would it be a defence in trover for a horse, and proofs made of a demand and refusal, that the horse had not been rode by the defendant, but remained at large in his pasture? The very statement of the case fur-

nishes an answer. I think the good sense of the law on this subject is clearly expressed by Lord Holt, in *Baldwin v. Cole*, 6 Mod. 212: "The very denial of goods to him that
" has a right to demand them, is an actual conversion, and
" not only evidence of it, as has been holden; for what is a
" conversion, but an assuming upon one's self the property
" and right of disposing of another's goods; and he that
" takes upon himself to detain another man's goods from him
" without cause, takes upon himself the right of disposing
" of them."

Let the rule for a new trial be discharged.

Stuart v. Fitzgerald—Bail.

The pleas were nul tiel record, death of the principal, payment and set-off—Surrender of the principal, and a special plea that the defendant was not sheriff at the time the writ was executed.

The plaintiff sued out a writ against Martin Armstrong from the county court of Surry, at May term, 1807, but it was not returned until November term of the same year, at which time it was returned with the following endorsement: "Executed, James Fitzgerald." No bail-bond was taken by the sheriff, a judgment was recovered against Martin Armstrong, and this is a *scire facias* against the defendant, to subject him to the payment of the judgment recovered against Armstrong, he having taken no bail bond. The defendant was elected sheriff of Surry at May term, 1806. At August term of the same year, he was qualified and gave bond and security. At May term, 1807, Thomas C. Burch was elected sheriff, and qualified and gave bond at August term following. It appeared from the evidence of Joseph Williams sen. Clerk of the County Court of Surry, that the practice of electing at May, and qualifying at August, ob-

tained at a time when the law required sheriffs to be commissioned by the Governor, and that the practice has continued to this time. It appeared further by his evidence, that the sheriff elected at May, did not enter upon the duties of his office until he had given bond and qualified at August term following his election. It appeared by an entry on the docket, at November term, 1807, that the suit was then returned by consent of Armstrong and Fitzgerald the present defendant. It appeared also, by evidence, of the deputy clerk, Joseph Williams, jun. that when Fitzgerald returned the writ at November term, he then observed that he had executed the writ in due time, but had failed to return it at August court preceding owing to its being mislaid. No capias could be found against Armstrong, the original defendant; but it appears from an entry on the execution docket, that a capias did issue from August, returnable to November, 1809, and that the same was returned "not found." It further appears, from the affidavits of Joseph Williams, sen. clerk of the county court of Surry, Joseph Williams, jun. deputy clerk, and John Wright, deputy sheriff, that a capias did issue, against the defendant Armstrong, from August court, and was returned by the sheriff to November, 1809, "Not found;" but that the same had since been lost or mislaid; after which the present scire-facias brought against Fitzgerald. The several papers alluded to in this case, accompany the same, and form a part thereof.

The Court adjudged that there was such a record, and a verdict upon the issues was found for the plaintiff. The following reasons were offered for a new trial, but were overruled. If the Court should be of opinion for the defendant, a new trial to be granted: if otherwise, judgment for the plaintiff.

REASONS FOR A NEW TRIAL.

1st. That it was adjudged by the Court, that there was a

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no record. 2d. That parole evidence was received to supply the record ; which was contrary to law. 3d. That the verdict of the Jury was contrary to law and evidence. 4th. Misdirection of the Court.

HALL, J. delivered the opinion of the Court :

It has been objected for the defendant, that at the time the writ in question was executed by him, he was not the sheriff of Surry county. It is not necessary to examine critically whether he was regularly, in all respects, chosen sheriff for that year, or not ; because it appears that he qualified by taking the oath of office, and acted as sheriff of the county during that time, and in that character returned the writ in question executed. After all this, he shall not be permitted to contradict his own acts. He objects again, by his counsel, that the *ca. sa.* which issued against his principal is not produced. It seems, from the clerk's execution docket, that such a writ issued and was returned "not to be found." It appears further, from the oaths of the clerk and his deputy, and the sheriff, that such writ was in the office, but had either been taken out or mislaid. For these reasons, we think judgment should be entered for the plaintiff.

Dodson v. Bush.

The plaintiff sued out an original attachment against the defendant, which was returned to December sessions 1811, of the county court, levied on sundry articles ; and the suit was then continued without further order, until September sessions, 1812, when judgment by default was entered and the cause continued until March sessions, 1813, when the default was set aside on motion, and Hill was allowed to enter into an interpleader, from which the plaintiff appealed to the superior court, where the order was confirmed and a *pro-*

cedendo ordered to the county court. From this order the plaintiff appealed to this court.

LOWRIE, J. delivered the opinion of the Court:

The act of 1794, on which the proceedings in this cause are grounded, is remedial, and ought to be so expounded as to obviate the mischief and advance the remedy intended. The object of the Legislature was to speedily settle conflicting claims to property attached.

The decision here complained of, is setting aside the judgment by default, after the cause had been pending two or three terms. It has not however been shewn, nor is it believed, that any evil can arise from such decision. No time is limited by the act of Assembly, when the party claiming the property attached shall interplead. We think he may do so on the return of the writ of attachment, or at any time afterwards, so that it is done before final judgment in the cause.

The party who interpleads makes no answer to the plaintiff in attachment, who may, notwithstanding such plea, if he has levied on any property belonging to the defendant, prosecute his suit to judgment. We therefore think that at any time during the pendency of the suit, he may come forward to insist upon having an issue made up to try the right of property. A different construction, such as contended for by the plaintiff in attachment, would facilitate the means of depriving a citizen, for a time, of his property without notice, encourage designing men in their attempts to do so, and reduce the true owner to the necessity of resorting to an action at law for compensation in damages; all of which mischiefs, we think it was the intention of the Legislature, in passing the law, to provide against.

Let the judgment of the superior court be affirmed.

Parish v. Fite.

Rule to shew cause why a new trial ought not to be granted :—

First. That after the Jury had retired under the charge of the Court, they came into court and wished some further evidence ; when the Court permitted two witnesses to be examined, who had not been previously introduced.

The facts of the case were, that there being two actions of the same nature against the same defendant, and during the examination of the witnesses, in the second cause, (and whilst the first Jury were out deliberating on the first) two new witnesses appeared in the second, who deposed to two facts, which were in the opinion of the Court important, and whose evidence would have been equally so in the first cause. After the second Jury had retired, the first came into court, and stated that they were not likely to agree and wanted some further information ; upon which the counsel for the plaintiff moved for leave to introduce two new witnesses, who had not been before examined, and which the court granted ; and which is the irregularity, upon which this rule is obtained.

LOCKE, J. delivered the opinion of the Court :

It must be admitted that the regular and proper practice would be, never to suffer witnesses to be introduced after the first examination, but especially after the arguments of counsel are closed. Yet we are of opinion that the discretion of the Judge must govern this rule of practice. The reason of the rule is grounded on the temptation it holds out for committing the crime of perjury. That when a cause has been argued, & the party discovers the points on which it is to rest, the Court will not permit a party to sup-

port the weak parts of his case, by a re-examination of the case. And we think it is right in every case to adhere to such a practice, unless the Court discovered the necessity of a re-examination, and that it will not be productive of the evil on which the rule is founded. In the present case, the Jury were in great doubt, and the evidence was sought for and asked by them. To satisfy them and relieve them from difficulty, at their request, the evidence was permitted to go to them. We are therefore of opinion that such evidence was properly permitted in that case, and that the rule ought to be discharged.

Cotton v. Beasley.

This was an action of debt on a bond for fifty dollars, claimed in consequence of the plaintiff's having won a race, made and run pursuant to certain articles. The plaintiff deposed that the bond was not in his custody or possession; that it was deposited in the office of the clerk of the county court; and that he had made repeated applications for it without having procured it. This testimony was objected to on the part of the defendant, but admitted by the Court. The clerk of the county court swore that he had searched for the bond in vain, and in his belief it was not left in his office. A witness then swore, that a bond for fifty dollars, payable either on demand or when the race was to be run, was staked in his hands by the plaintiff and defendant, with condition to be delivered to the winner of a horse-race. The same witness also swore, that some time prior to the date of the articles, a parol agreement to run a race was made between the plaintiff and defendant. But the articles now produced were executed in consequence of the parol agreement, and were signed, &c. by the parties on the same day on which they were written and bear date; and that they were then

attested by him. The introduction of these articles as evidence was objected to by the defendant's counsel, but admitted by the Court.

There was no evidence that the distance run was ascertained to be a quarter of a mile ; but it was proved that immediately after the race was run, the defendant acknowledged he had lost it, and that the bond was delivered by his direction to the plaintiff.

Upon this latter evidence, it was left by the Court to the Jury to decide whether the distance run was a quarter of a mile ; but the Court did not instruct the Jury that any ascertainment or measurement of the distance was necessary to be proved. The Court stated to the Jury, that no parol evidence was admissible to connect the bond with the agreement ; that they must look into the agreement and consider the description of the bond given by the stake-holder, in order to decide whether the bond declared on is the one which was staked, in pursuance of the articles, to secure the payment of the money lost on running the race : That having decided this point, they would consider whether the race was run according to the articles, with respect to distance, time and circumstances ; and whether it was run fairly and according to the usages of racing. Upon this, the Jury found a verdict for the plaintiff, for the sum of twenty-five pounds, assess his damages, to five pounds and costs.

HALL, J. delivered the opinion of the Court.

It has been objected that parol evidence should not be introduced to prove the contents of the bond, because the act on this subject declares that, on every trial, an obligation for the amount of the money, &c. bet, shall be produced—That is true, and the Legislature no doubt had it in view to compel parties to produce evidence of higher dignity, as to racing contracts, than before by the rules of law

were required. But before that act passed, had the sum bet and won been secured by a written obligation, it was incumbent on the plaintiff to produce it. So it is in all cases necessary to produce the instrument of writing on which a suit is brought ; and this can only be dispensed with where it appears that such instrument has been lost through accident ; in such case, the plaintiff will be excused and may give evidence of its contents. So with respect to the bond in question, the act requires it to be produced ; but if satisfactory evidence of its loss by accident be given, parol evidence of its contents should be received.

It has been objected that the articles should not be received as evidence, because the contract which they contain was made prior to the date of the articles, but not committed to writing until the day they bear date. Whilst the contract stood as a mere contract by parol, it was a nullity ;—but the moment it was committed to writing, it became for the first time, such a contract as the Act of Assembly recognizes, and of course, it was proper to receive it as evidence. So far the superior court acted correctly. But it appears from the case sent up, that the plaintiff himself was introduced to prove the loss of the obligation. It is a very general rule that a party shall not be a witness in his own cause ; any exception from that rule must be founded in necessity. Now it is very true, that the party himself very frequently is the only witness of the loss of a paper ; and if there could not be a remedy for him without the aid of his own testimony, it ought to be received from the necessity of the case. In answer to this, it may be observed, that he has a remedy in Equity, where he will be at liberty to swear to the loss of the obligation, and where the defendant will also be at liberty to make any answer he pleases upon oath, and when, too, if a decree is made for the complainant, it will be upon condition that he enters into bond to indemnify the defendant against any demand which may be made

against him in consequence of such lost bond. It seems not to be right, that the plaintiff shall be permitted to become a witness at law, and not the defendant. Suppose the plaintiff swears at law that he has lost the bond, the defendant will not be permitted to swear that he has paid it, taken it up and destroyed it. It seems wrong that the parties should stand upon any other than equal grounds. In a court of equity they will both be heard upon oath. The plaintiff can require no more than that he may proceed at law, if he can make out the loss of the obligation by disinterested testimony. I repeat again, if he wishes to become a witness in his own cause, let him bring his suit in equity.

A new trial should be granted.

Mann v. Parker.

This was an action on the case, in the nature of deceit, for a fraud in the sale of a negro wench and child. It appeared in evidence, that the plaintiff, who was a speculator in negroes, applied to the defendant for the purpose of purchasing the aforesaid negro woman and child; that the defendant said he wished to sell them, named his price, and told the plaintiff, "go into the kitchen, look at the negroes and judge for yourself;" that the plaintiff continued there while the defendant and his family breakfasted, and upon the plaintiff's coming out of the house, the defendant asked the plaintiff how he liked them, who answered, "very well;" that a bargain was concluded, and a day agreed on when the negroes were to be delivered, and a bond for the purchase money executed; that on the day, the plaintiff was asked by one Tisdale, who was a partner with him in the purchase, what kind of bargain he had made, to which he replied "I have got a likely wench, and the child is middling;" that after a bill of sale and a bond were executed,

the defendant said to the plaintiff "if you wish to be off the bargain you may : I can get the same price from another man, and you are at liberty either to take the bond or the bill of sale." The plaintiff replied, "he had bought the negroes and would hold him to his bargain." It further appeared in evidence, that the defendant had bought the negroes in question at a public sale, about nine months before the sale of them to the plaintiff, and the child at the time of the latter sale was between fifteen and nineteen months old, and at that age it was not able to walk, talk or move, except upon its back backwards ; that the plaintiff shortly afterwards carried them to South-Carolina with others, that a snow fell on their journey, that the child was neglected by its mother, was attacked with a dysentery, in common with other negroes in company, and when they got there the plaintiff could not sell the child, but gave it away. One witness, who lived in the family of the defendant at the time the plaintiff went to examine the mother and child, said the child appeared to be well and ate hearty, but thought it might appear to the most common observer that the child was not altogether right. The witness further declared that the defendant one day observed (looking at the child) "I wish you were on the Sand-hills and I had my money for you."

There was no evidence that the defendant knew of any latent defect, other than that the child was kept in the house where the defendant and his family eat, or if knowing of any that he endeavored to conceal them ; and the person who had sold the negroes in the character of executor or administrator, testified that he knew of no defects.

Upon this evidence, the Court left it to the Jury, with directions, that if they believed that the negro child was unsound, and its defects were known to the defendant, and he failed to disclose them or endeavored to conceal them, or was guilty of any fraud or misrepresentation, they ought to

find a verdict for the plaintiff; but that if, on the contrary, they believed the defects, if any, were unknown to the seller, and he had been guilty of no fraud, or if the defects were known, and of such a nature as to be discovered by a common observer, and the plaintiff had an opportunity of satisfying himself on this head, then they ought to find a verdict for the defendant.

There was a verdict for the defendant, and a motion for a new trial, which upon argument was refused; whereupon the plaintiff prayed an appeal, which was granted.

LOCKE, J. delivered the opinion of the Court:

From the above statement, it appears, that the plaintiff in this case was entitled to a verdict and judgment, provided the evidence adduced was sufficient to satisfy the Jury that the defendant had knowledge of the defects of the property by him sold to the plaintiff; and that the cause was submitted to the Jury on that point. The Jury, however, have found in favor of defendant; and a motion was made, and a rule granted to shew cause why this verdict should not be set aside and a new trial granted, as being either directly contrary to evidence, or at least contrary to the weight of evidence. It cannot be denied, I apprehend, at this day, that if the present case can with propriety be brought within either of the above rules, that then the Court ought to grant a new trial. We must then advert to the facts stated in this case, and endeavor to ascertain whether they are not such as ought to have induced the Jury to give a contrary verdict.

It appears that the defendant purchased the child in question nine months before the sale to the plaintiff, and during that time it remained in the same house where defendant usually breakfasted and dined. The child was advanced to the age of fifteen or nineteen months old, and utterly in-

capable of walking, talking or moving, except on its back backwards. Is it likely, then, that a defect so apparent would, during all this time, and with so many opportunities of observation, escape the notice of the defendant or some portion of his family who would communicate it to the plaintiff? If we were to judge of this defendant, as (from our experience and knowledge of mankind) we would judge of ourselves, the inference is irresistibly strong to prove knowledge in the defendant. But this is not the only fact: A day is appointed for the delivery; and when plaintiff arrives to receive his property, without the least intimation of dissatisfaction on the part of plaintiff, the defendant proposes to recant, but plaintiff refuses. What then could induce this proposition on the part of defendant? The reason assigned by himself was, that he could get the same sum, but no more, from another person. He would therefore gain nothing by this recantation, except the trouble of making a new bargain, an interest which few men covet. I incline, however, to believe this was not the true reason of the proposition; but that he expected, if a suit should be brought against him for the fraud practised on the plaintiff, proof of this proposition would tend to shew his innocence; whereas I think it shews his guilt. But if these two circumstances, should be thought insufficient, or leave the fact doubtful (in which case the rule ought to be discharged) it would seem that the declarations of defendant, when coupled with them, places the fact beyond the possibility of a doubt. It is stated in the case, that some time before the sale to plaintiff, the defendant when viewing the child in question, said "I wish you were on the Sand-hills, and I had my money for you." Surely this declaration proves, that defendant had, after his purchase, discovered something in the child, which in his estimation impaired its value, and made him willing to have his money again. To this evidence on behalf of plaintiff, there is nothing, or at least very little, opposed on behalf of defendant. Although the case states that no direct evidence

was given of defendant's knowledge except the above facts, yet I think these three circumstances, taken together, cannot fail to satisfy the most cautious individual that defendant had this knowledge, and that he concealed or did not disclose the defect to the purchaser. I therefore cannot view this verdict in any other light than that of a verdict against evidence, or (to say the least) the weight of evidence, and against the justice of the case.

Let the rule, therefore, be made absolute, and a new trial be granted.

Bank of Newbern v. Taylor.

Idem v. Mastin.

Motion for judgment against the defendant, under the act incorporating the Bank, which authorises judgments to be entered up the first term, where the note was made negotiable at the Bank. The certificate of the president and cashier as to the amount of the debt was exhibited, and the required notice proved. The defendants pleaded that the right claimed by the plaintiffs, to have judgment of their demand on motion and notice, is unconstitutional and ought not to be allowed.

A very full argument was made at January Term, by GASTON for the plaintiff, and CAMERON for the defendant; when the Court took time to advise; and now their opinion was delivered by

HALL, J. It is not questioned but that the Legislature had the power to grant the charter which is the basis of the Newbern Bank. The object of this grant was the public good, which while the Legislature had in view on the one hand, the grantees had their individual good in view on the other. To

carry into effect, then, the scheme of the Bank, it became necessary for the parties to enter into arrangements for that purpose : Amongst others, they adopted the one complained of, namely the summary mode of proceeding against their debtors. It is objected that this is a violation of the 3d section of the bill of rights, which declares, " That no man or " set of men are entitled to exclusive or separate emoluments " or privileges from the community, but in consideration of " public services." I think that objection will vanish when we reflect that this privilege is not a gift, but the consideration for it is the public good, to be derived to the citizens at large from the establishment of the Bank. It is not for this Court to say whether the Legislature made a good or a bad bargain ; it is sufficient to see that they contracted under legitimate powers, and their contracts under such, we can have no control over. If we have, we might as well say, we will make such contracts for them. Although it is the duty of this Court, as far as they can, when they believe a law to be unconstitutional, to declare it, yet they will not undertake to do so in doubtful cases. Mutual tolerance and respect for the opinions of others require the exercise of such power only in cases where it is plainly and obviously our duty to interfere.

It is not for this Court to judge of the expediency of the measure, nor to estimate its anticipated or actual benefit or injury to the community. Those are considerations strictly of a legislative nature, and the competent authority has pronounced upon them.

Carthy v. Webb.

Daniel Carthy applied to the County Court of Orange for administration on the estate of John Casey, deceased. This application was opposed by James Webb, on the ground of

his being the largest creditor in the State. The Court verruled the application of Daniel Carthy, from which decision he prayed and obtained an appeal to this Court. The cause came on to be heard this term; and it appeared in evidence to the court, by the testimony of Samuel Turrentine and John Umstead, that John Casey died intestate, in Hillsborough, about the 4th July, 1812, leaving Daniel Carthy of Newbern, his next of kin in the United States, and had two Sisters in the Kingdom of Great Britain about six years ago. The witnesses aforesaid proved that the said Daniel was the first cousin of the deceased John Casey.—The said James Webb proved a debt due to him of two hundred dollars, no other creditor of a higher nature applying for administration.

The case was argued by BROWN and NASH for the plaintiff, and NORWOOD for the defendant.

TAYLOR, C. J. delivered the opinion of the Court.

As the sisters of the intestate, who are his nearest of kin, are resident beyond sea and subjects of a hostile country, they are certainly disqualified from administering on his effects. This principle may fairly be extracted from the numerous cases on this point, which are however so much in conflict, as not to yield any satisfactory information on the question, whether an alien enemy may bring an action as administrator. The two cases in Cro. Eliz. 142 and 683, are in direct opposition to each other. The true rule probably is, that even an alien enemy may rightfully act as executor or administrator, if resident within the State, by the permission of the proper authority; but without such authorized residence, he must be subject to all the incapacities which appertain to his civil condition. For this reason, it is wholly unnecessary to go into the enquiry, whether the sisters of the intestate are living or not, for taking them to be so, it does not in our opinion weaken the claim of the plaintiff.

Considering the act of 1715, in reference to the provision made on the same subject, by the two statutes of 31 Ed. 3 and 22 Hen. 8, it would seem to be exercising too great a latitude of construction to pronounce, that because the nearest of kin labour under an impediment, therefore all the next of kin shall be excluded, and that the claims of a creditor shall be preferred to those for whose primary benefit the statutes were enacted. On the contrary, the natural meaning of those laws seems to be, that if administration cannot be granted to the nearest of kin, on account of some existing incapacity, it shall be granted to the next after him, qualified to act, and that the creditor shall be postponed, if any of them claim the administration within the time prescribed by law. Let administration be granted to the plaintiff.

Carr v. Hairston.

The County Court of Stokes ordered that the road crossing Dan-River at Bostick's old place should be discontinued; and after this order was made, Hairston run a fence across the road, and kept it up for the space of one month and more. Carr brought a warrant to recover the penalty given by the 13th section of the act of 1784. The road was discontinued without the intervention of a jury: And it is submitted to the Supreme Court, to decide, whether, as the order for discontinuing the road was not founded upon the report of a jury, the same be valid and effectual in law to discontinue the said road. If it be not, judgment to be entered for the plaintiff; otherwise for the defendant.

HENDERSON, J. delivered the opinion of the Court.

By the act of 1784, in the laying out, altering, or changing roads, the interposition of a jury is necessary; and the law has directed that damages may be assessed and the most

proper grounds pointed out, over which the road shall run. But in deciding in the first instance, that there shall be a road in a particular section of the country, or in discontinuing such roads as may be deemed useless, a jury has nothing to do; the whole power is given to the court. We therefore think the order of the County Court, discontinuing the road in question, is a legal one and such as the court might well have made. It follows therefore that the defendant is entitled to judgment.

Hunter & Hunter v. Jackson & Jackson.

This was an action of covenant founded on the following articles :

“ State of North-Carolina, Franklin County.

“ Articles of agreement made and concluded this day by
“ and between Henry Hunter and Benjamin B. Hunter, of the
“ one part, and Alsey Jackson and William Jackson, (Miller)
“ witnesseth that the said Henry and Benjamin B. Hunter do
“ agree to run a certain horse called Score double, carrying one
“ hundred and fifty five pounds, against a certain horse known
“ by the name of Brutus, carrying one hundred and forty five
“ pounds, which they the said Alsey and William Jackson
“ (Miller) do agree to run ; which race shall be run at Henry
“ Hunter’s paths near Tarborough, one quarter of a mile, on
“ the first Thursday in April next, at or before four o’clock
“ in the afternoon, for the sum of five hundred dollars, to be
“ staked in bonds with approved security the said Hunters
“ agreeing to give said Jacksons choice of paths and twenty
“ five dollars as a compensation for running in the above
“ named paths. Which race shall be entirely void provid-
“ ed either of the principals or either of the said horses should
“ die before the above named day ; otherwise to be run

" play or pay. In witness whereof we have hereunto set
 " our hands and seals, this first day of December 1810.

| | |
|------------------|--------------------------|
| | " H. HUNTER, (Seal) |
| | " BEN. B. HUNTER, (Seal) |
| " Witness | " ALSEY JACKSON, (Seal) |
| " P. C. PERSONS. | " WM. JACKSON, (Seal) |

The plaintiffs declare upon the following breaches :

1st. That the defendants did not stake their bond agreeable to the articles.

2d. That the plaintiffs beat the race.

The plaintiffs proved that on the day named in the articles, the ground was measured, and the weights made out : That precisely at four o'clock, one of the judges, who held the watch, proclaimed that fact, immediately upon which both the parties started : That plaintiff's horse came out twenty feet foremost, bearing his proper weight—Start even : There was no evidence that plaintiffs offered any choice of paths to defendants, or that defendants complained of not having choice : There was no evidence that either of the parties said any thing respecting a stake-holder to deposit bonds with. There was evidence that the plaintiffs gave to one of the judges chosen by himself a paper writing of which the following is copy :

" For value received, with interest from the date hereof,
 " we promise to pay to Alsey Jackson or Alsey Jackson and
 " William Jackson (Miller) or order, five hundred dollars.
 " Witness our hands and seals, this 4th April, 1811.

| | |
|---------------|--------|
| " H. HUNTER, | (Seal) |
| " LEWIS FORT, | (Seal) |

Which was delivered to his said judge, after he was chosen, the day the race was run. There was no evidence that the plaintiffs, or either of them, gave defendants any notice of the above deposit, or that the purpose thereof was explained to

the depositee ; but depositee conceived himself it was staked on said race. Nor was there any evidence that the plaintiffs called upon the defendants or either of them, to make a like deposit on their part ; or that either of them had notice of the deposit by plaintiff's ; or that the defendants, or either of them, had ever seen the bond, or had been informed of its contents, or knew that any such was executed. The plaintiffs called a witness, who testified that he had been conversant in the rules of horse-racing, and gave it as his opinion the said deposit was a proper stake, and said his opinion was confirmed on a race with a certain Col. Bynum. The witness being pressed for time (the hour at which they were to start having nearly arrived) made a similar deposit ; and that Col. Bynum, who was reputed to be experienced in the rules of racing, being unable to make up his stake, and not running with the witness, paid the money.

There was evidence that a few minutes before the hour of four, plaintiffs called upon defendants to make ready, the time was nearly out. Said witness also declared it was generally the case to choose a stake-holder.

HALL, J. delivered the opinion of the court :

It is of no importance to enquire, whether the defendants made out their stakes, agreeably to the contract, or not, provided they lost the race. They are as much liable for one breach as two, provided the plaintiffs complied with all the requisites of the contract. But if they have omitted to comply in any one particular, they are as much disabled to recover, as the defendants to defend themselves successfully in case they had done so. Then have the plaintiffs shewn that they themselves staked agreeably to contract? I think they have not. Because, in the first place, the bond staked by them was only signed by one of them ; and in the second place, if it had been signed by both, the defendants had no notice of it, to which they had a right. Suppose the

plaintiffs not to have been worth \$500, had they not a right to know who the security was? It was expressly stipulated that approved security should be given, which shews that the parties distrusted each others ability to pay. But again what would have been the situation of the defendants, in case they had won the race, and the plaintiffs had been insolvent, and had said nothing about the bond pretended to be staked? Or suppose by some means, in that situation, they had come to the knowledge, that such a bond was in the hands of one of the judges, could they have recovered it of him as stakeholder? He did not know himself, that it was placed in his hands for that purpose, or on what account or for whose benefit it had been delivered to him.

The case is too plain to admit of a doubt. As to what the witness said about the rules of racing, it is neither entitled to notice or respect. If such be the rules of racing, I should be sorry to consider them to be the rules of this court, being founded neither in reason or justice. Judgment therefore for defendants.

Nicholson v. Hilliard.

The following questions are submitted to the Supreme Court for their decision :

1. Shall one who has purchased lands without a warranty be permitted to give copies of title deeds, except of that immediately to himself, in evidence, without an affidavit by himself to account for the non-production of the originals?
2. Shall a purchaser with general warranty, be permitted to give such copies in evidence without such affidavit.
3. Shall a purchaser at a Sheriff's sale be permitted to give such copies in evidence without such originals?

TAYLOR, C. J. The law, proceeding upon the rule that the best evidence the nature of the thing is capable of shall be produced, requires a person who ought to have the custody of a deed, to exhibit it to the Court, in the necessary deduction of his title. And in such case, a copy from the register's office, or even inferior evidence, has, by the constant practice of this State, been admitted upon the oath of the party, that the original is lost or destroyed: If it be in the adversary's possession, notice to produce it must be given to authorise the introduction of secondary evidence. But where the law does not suppose a party to have custody of the deed, either as party to it, or as privy in representation, it admits, at once, the inferior proof, without requiring his oath as to the original.

The cases in which a party ought to have custody of the original deeds, and where, consequently, he will be compelled to produce them, or account for their absence, are stated in *Buckhuerst's* case, 1. Rep. 1. where land is sold without warranty or with warranty only against the feoffor and his heirs, the purchaser shall have all the deeds as incident to the land, in order that he may the better defend it himself—But if the feoffor be bound in warranty and to render in value, he must defend the title at his peril, and the feoffee is not to have custody of any deeds that comprehend warranty, of which the feoffer may take advantage. A purchaser at a sheriff's sale may give the copies in evidence, where it is necessary to deduce the title of him whose land was sold, because he is only privy in estate, and is not supposed to have custody of the originals.



Mealor v. Kimble.

Action for money had and received to the use of plaintiff. On the trial, the plaintiff produced the following instrument of writing, to wit:

“ March 22d, 1808, then received of James Mealor a tobacco note, inspected at Petersburg, weight 1415 pounds nett, which I am to sell at Petersburg, or elsewhere, for the best price I can get for it, and the money to be placed to the credit of John Cheeks, executor of James Mealor, obtained the 9th January, 1808, and I, the said Benjamin Kimble, am to retain to myself what Thomas Moody owes me out of this money.” Signed,

“ BENJAMIN KIMBLE.”

The aforesaid receipt was proved to be in the hand writing of the defendant. The plaintiff further proved, that in the August of the year 1808, the defendant sold the tobacco-note above described to Dudley Clanton, of the county of Warren, at the price of 4 dollars per cwt. and on the 25th of December afterwards, received the money of Clanton, the tobacco being sold upon short credit. The plaintiff produced upon the trial an account stated in the following words, to wit :

1808 “ *Benjamin Kimble, Dr.* “ *To James Mealor.*

“ To balance of hogshead of tobacco, weighing 1415lbs.
“ nett, from 19s. to 24s.”

This account was also proven to be in the hand-writing of the defendant Kimble. The plaintiff proved upon the trial that, some time in the month of May, 1808, after the defendant's return from Petersburg, upon his being asked whether he had sold Mealor's tobacco, and if he had, at what price, the defendant replied, that he had sold it at 19s. per cwt. It was proved and admitted upon the trial, that the defendant paid to Mealor's use the amount of the tobacco specified in the receipt at 19s. per cwt.

On the part of the defendant, the deposition of Gideon Johnson, of Petersburg, was read in evidence, which states the following facts, to wit :

That on the first day of April, 1808, Benjamin Kimble, the defendant came to the store where the deponent lived, in said town. The deponent asked him if he had sold the hogshead of tobacco which his negro had some time previous brought down, and had inspected at Cedar Point warehouse. He answered no, though he wished to sell the same then. The deponent offered him 20s. per cwt. After some minutes he agreed the deponent should have the tobacco at 20s. per cwt. which he paid him. Kimble then offered to sell the deponent a hogshead of tobacco, which he said belonged to his neighbor. The deponent refused, knowing nothing of the quality. Kimble then observed, that he should like to get the same price for his neighbor's as he had got for his own. The deponent then observed to him that he did not want that hogshead at all, and advised him to some purchaser, who was buying upon the face of the note. He went off and returned without success. The deponent then proposed purchasing the other hogshead of his, which Kimble observed he intended holding up for a better price. The deponent having seen this hogshead the same day, made him an offer of 19s. per cwt. which he agreed to take, and keep his neighbor's tobacco for himself, as his would sell for the best price. The price of tobacco was then 18s. and the deponent does not recollect of purchasing any other tobacco of Kimble that year. The defendant farther proved that Clanton parted with the tobacco note purchased of Kimble at 24s.

Upon the foregoing facts, the plaintiff insisted he was entitled to a verdict for the difference between 19s. and 24s. for 1415 pounds of tobacco; but the Jury, under the charge of the Court, gave their verdict for the defendant. Motion for a new trial, upon the ground of a misdirection of the Court.

SEAWELL, J. delivered the opinion of a majority of the Court :

From this case, it is evident, that the defendant acted as agent or trustee for the plaintiff; and that it was the understanding of the parties, he was to have nothing for his trouble. And it is equally clear that the agent accounted for the tobacco at 19s. (under pretence of having sold for that price) and afterwards sold for 24s. by which he gained 5s. in each hundred weight.

But it is attempted to be inferred from the statement, that the defendant was unable to sell the plaintiff's tobacco for as much as 19s. and with a view of obliging him, substituted one of his own hogsheads that would command that price.— Without enquiring whether there is sufficient evidence of fraud in the conduct of the defendant to overrule the verdict, we are of opinion, that it is not in the power of an agent to become a purchaser himself, without leaving it also in the power of his principal to put an end to the sale; to prove which, 2 Brown. Ch. Rep. 400, 430, and 5th Ves. jun. 680; are very much in point. In the present case, the plaintiff has elected not to be bound by the exchange of the tobacco, which the defendant, in his representative character, thought fit to make with himself; and calls upon him to account for the full amount, and no more, of the tobacco he was entrusted to sell, and which he has sold; and this we think he is entitled to by law, and that therefore the rule for a new trial be made absolute.

HALL, J. It seems, that the plaintiff, being indebted, did on the 22d March 1808, deliver to the defendant the tobacco in question, to be by him sold, and the money arising from the sale to be applied towards the discharge of his debts. In the course of a week after that time the defendant attempted to sell the tobacco in the town of Petersburg. The price of tobacco at that time, on the face of the note, as it is called (that is although it had passed inspection but the quality unknown to the purchasers,) was 18 shillings. Now had Kimble sold the tobacco, for that

price, no blame could have been attached to him. But his own tobacco having been opened and looked at commanded a better price. He therefore substituted this in the room of it, and sold it for 19 shillings, and applied the money towards the discharge of the plaintiff's debts as he had agreed to do. At what time indeed does not appear, but there is no complaint on that score. In the month following he stated, when asked, that he had sold Mealor's tobacco at 19 shillings. Now as he had not sold Mealor's, but his own tobacco, avowedly a substitute for it, and that for a greater price than Mealor's would have brought, and applied the money to Mealor's use, he thereby, I think, made Mealor's tobacco his own, and had it fallen in price after that time, he must have borne the loss. Let it be remembered, that there is no allegation or proof of fraud in the defendant.—Months after this time when Mealor's debts were paid off, in the month of August, the tobacco was sold for 24 shillings, on a credit of four or five months, and it is alledged that the plaintiff is entitled to the difference between 19 and 24 shillings. If Kimble had kept his own tobacco, the probability is, that he might have sold it for more than 24 shillings. There can be no doubt, but he could have sold it for as much. And had he kept it and done so, things would have been precisely as they are, except that the plaintiff would be rather more than 14 shillings poorer than he is. It matters not that the tobacco sold for 24 shillings. Had it sold for 4 shillings only, the defendant must have borne the loss. Besides, it is well known that tobacco generally rises in price from the time it is inspected, at least for one year.—From this view of the case, rather than the defendant should be compelled to settle with the plaintiffs at 24 shillings per hundred, the plaintiff should return to the defendant 1 shilling per hundred, rating the tobacco at 18 shillings, the price it bore, when he substituted his own in the room of it and sold it for 19 shillings. But it is said that a trustee shall not become a purchaser, and the case of *Fox v. Mac-*

Creth, 2 Brown, 400—Forbes v. Ross, 2 Brown 430—Whichcote v. Lawrence, 3 Ves. jr. 740—and Campbell v. Walker, 5 Ves. jr. 678—are relied upon. This position cannot be admitted except under certain limitations. I will examine it, but without believing that its solution is indispensably necessary to a decision in the present case, for I can view no other person as the real purchaser but G. Johnson.

In the first of the cases cited, the trustee who purchased, was decreed still to be a trustee, because he was guilty of a fraud in taking an undue advantage of the confidence reposed in him. That case is founded in reason and justice, and ought to be considered good authority, when a similar case shall occur. In the case of Forbes and Ross, no fraud was alleged against the trustee; but through a misapprehension of what his duty was, he took money to himself at four per cent. which the testator had directed to be laid out at the most that could be got for it; giving as a reason for so doing, that the testator had loaned him money upon those terms during his life. It appeared also, that the trustee was a man of large property. This is a short, and certainly was a very plain case, for although there was no fraud alledged in the trustee, yet he became a gainer and his *cestui que trust* a loser by his conduct, and it matters not whether such conduct was induced by fraud or happened through ignorance. In the case of Whichcote v. Lawrence, the Chancellor observes, “that it is not true, as a naked proposition, that a trustee cannot buy of the *cestui que trust*,” and goes on to qualify it by further observing, “that it is plain, in point of equity, and a principle of clear reasoning, that he who undertakes to act for another, in any matter, shall not, in the same matter, act for himself; therefore, a trustee to sell shall not gain any advantage by being himself the person to buy; because he is not acting with that want of interest, that total absence of temptation, that duty imposed upon him, that he should gain no profit to himself.” In the same case his Lordship observes,

that he does not recollect any case, in which the mere abstract rule came distinctly to be tried, abstracted from the consideration of advantage, made by the purchasing trustee ; for unless advantage is made, the act of purchasing will never be questioned. From these authorities, then, it appears, that courts of equity interfere to declare trustees still to be trustees, where a benefit accrues to themselves, and a loss to their *cestui que trust*, in consequence of their having become purchasers. If, then, Kimble was the purchaser of the tobacco in question, that purchase is not shaken by the principles on which these cases profess to have been decided ; because he gained no profit to himself thereby, and, instead of a loss, a benefit accrued to the plaintiff. It remains to be seen what bearing the case of Campbell and Walker will have on the case : In this case, the Master of the Rolls says, "there never was a rule that no trustee should buy," but adds, that "if they do purchase *bona fide*, they purchase "subject to the equity, that if the *cestui que trust* come in "a reasonable time they may call to have the estate re-sold." To examine this case by that rule, it must be kept in view, that Mealor, the plaintiff, was indebted to Cheek's executors (most probably by judgment, but the case does not expressly say so) which debt, as well as the one due to Kimble, the defendant, from Moody, was to be discharged by the proceeds of the sale of the tobacco. This sale took place on the first day of April, 1808, in consequence of which those debts were promptly discharged. The month afterwards, this fact was disclosed by the defendant to the plaintiff, except that he said he had sold Mealor's tobacco, when in fact he had sold his own. This literal deviation from truth, seems to give some umbrage, but it should be recollected, by way of extenuation, that two hogsheads of tobacco, made in the same neighborhood, of the same weight (or so nearly so as that that circumstance makes no difference) when offered for sale on the face (that is, without the quality of either being known,) are as much without ear marks as two

bushels of black-eyed peas out of the same field : and as far as there was any difference in the present case, the advantage was on the side of the defendants. Be that as it may, Mealor's debts being paid, he remained satisfied two years and seven or eight months ; for on the 15th day of November 1810, the writ in the present action issued. This, to be sure, is not made part of the case now before the court, but if it is of any importance, and does not appear, (and it seems to be so from the case last cited) why may not this court as well suppose that the plaintiff has been guilty of neglect in not bringing his suit in proper time, as that he has done so, and that the sooner, as it is more than five years ago that this transaction took place. Under all the circumstances of the case, connected with this lapse of time, and under a knowledge that his debts were discharged, by a sale of his tobacco, at 19 shillings per cwt. more than it was really worth, I cannot believe, that the Master of the Rolls, who laid down the rule, would have sustained a bill on behalf of the plaintiff, in case it had been brought before him. It seems, then, that a trustee may be a purchaser, and that his purchase will be protected, unless the *cestui que trust* applies in a reasonable time after notice, to have a re-sale. It would seem, then, agreeably to these rules, that, if Kimble became the purchaser of Mealor's tobacco, by selling his own in lieu of it, he ought to be protected in that purchase. It is not denied, but that the sale was honestly made, and for a full price, and it would have been made equally so, if the plaintiff's tobacco had been sold for 18 shillings. But let it be assumed, that Kimble had no right to substitute and sell his own tobacco, for Mealor's, it follows, that Mealor's tobacco was not sold at all ; then Mealor's debts were paid with Kimble's own money, and had he brought an action against Mealor for the money, so advanced, he would have defended himself by proving the terms on which Kimble took the tobacco, and that the price of tobacco was 18 shillings, at the time Kimble ought to have sold it ; and so it would have

been settled. There would be the same result, if the present action had been brought before Kimble sold to Clanton; and why that circumstance should make any difference, I am at a loss to see. Had not Meador's debts been paid off, the case would be very different; in that case, if tobacco had risen, after the time when Kimble ought to have sold, he ought to be answerable for such rise; or in case it had fallen, he ought to be answerable for what it would have bro't when he ought to have sold it; or had his own tobacco been of less value than the plaintiff's, and had he sold it as the plaintiff's, the same consequences ought to follow. The only offence I can see that the defendant has been guilty of is, that he allowed the plaintiff a greater price for his tobacco, or sold his tobacco for a greater price than it was worth; for this I think he ought to be forgiven, and the rule for a new trial discharged.

Dickerson v. Dickerson.

This was a bill in Equity, the material statements in which were, that in 1782, David Dickerson, the elder, conveyed a slave to Shadrack Dickerson, by deed, which on its face purports to be absolute, and made for valuable consideration; whereas, in truth, the deed was made in trust, for the benefit of David, and under an agreement on the part of Shadrack, that the slave should be delivered and reconveyed to David, or to such person as he should at any time direct. The bill charges, that no consideration was paid, and that the complainant being a judgment creditor of David's, the latter did, in 1810, assign all his right in the said slave to him, of which Shadrack had notice, but refused to give up the property, insisting that he was an absolute purchaser for valuable consideration.

The answer denies the trust, avers a valuable consideration to have been paid, and insists on the transaction having been an absolute purchase.

The only question submitted to the decision of this court was, whether parole evidence was admissible to shew that the deed was made under the trust specified in the bill, and that a valuable consideration was not paid. *Gaston* for the complainant, cited 2 Ves. 375. 2 Atkins 225. 3 Atkins 415.

TAYLOR, C. J. The Court have looked into the cases of *Smith v. Williams*^a and *Streeter v. Jones & Lane*, heretofore decided, and are of opinion that the case now before them is

^a*Smith v. Williams.*

The plaintiff brought an action on the case against the defendant for a breach of warranty, in the sale of a Negro. The declaration alleged, that the defendant warranted the Negro to be sound and healthy, as far as he knew : That the Negro was not sound and healthy, but afflicted with a rupture ; and the defendant well knew he was so afflicted, at the time of the warranty and sale. The Jury found a verdict for the plaintiff, subject to the opinion of the court on a point of law reserved in the course of the trial, viz. Whether plaintiff could be permitted to prove such a warranty, when at the delivery of the Negro upon the sale, he received from the defendant a written instrument, but not under seal, in the following words :

“ Know all men by these presents, that I, Obed Williams, of the county of Onslow and State of North-Carolina, planter, have bargained and sold unto David Smith, of the aforesaid county and state, one Negro fellow, named George, about 50 years of age, for and in consideration of three hundred dollars—do warrant and defend the said Negro against the lawful claim or claims of any person or persons whomsoever, unto him the said Smith, his heirs and assigns forever. Given under my hand this 29th January 1802.

“ OBED WILLIAMS.

“ Test,

“ GEORGE ROAN.”

This instrument was duly proved, &c. The case was argued by *Gaston* for the plaintiff and *Jocelyn* for the defendant.

TAYLOR, C. J. The contract between the parties is stated at length in the special case, and appears to be both formally and substantially a bill of sale in all respects, except as to the want of a seal. This omission, however, is so important in the legal estimation of the paper, that it cannot be classed amongst specialties, but must remain a simple contract, on which no additional validity can be conferred by the subsequent registration. For I do not apprehend that any legal effect can be given to a paper by recording it, if that ceremony were not required by law.

governed by them, and that consequently it is not competent for the plaintiffs to introduce parol testimony.

Miller v. Spencer's Administrators.

The administrators plead fully administered, former judgments, &c.

Judgments had been taken at July term, 1807, to the full amount of assets then on hand ; since which time, a judgment had been taken in favour of James Greenlee for £280, against these defendants also ; a suit which had been depending between the defendant's intestate and Davidson was

It might not however be an useless enquiry to consider, whether a paper containing nearly all the component parts of a specialty or deed, does not advance some greater claims to be respected in the scale of evidence, than such proofs of a contract as rest upon the memory of witnesses.

The solemnity of sealed instruments has been, from the earliest periods of the law, highly regarded ; because the forms and ceremonies which accompany them, bespeak deliberation in the parties, and afford a safe ground for courts and juries, to ascertain and settle contested rights. This deliberation is inferred, not from any one circumstance attending the transaction, but as the general effect of the whole. Thus, in *Plowde* 308 B. "It is said that deeds are received as a *lien final* to the party making them, although he received no consideration, in respect of the deliberate mode in which they are supposed to be made and executed : for, 1st, the deed is prepared and drawn ; then, the seal is affixed ; and lastly, the contracting party delivers it, which is the consummation of his resolution." Hence it appears that the law gives to deeds a respect and importance which it denies to any other contracts ; not an empty and unmeaning respect, but such as properly arises from the existence of all those circumstances, which are calculated to fix and make authentic the contracts of men.

A contract cannot be a deed, if either it is not prepared and drawn ; if the seal be not affixed, or if it be not delivered ; but still if the deliberation is inferred from all these circumstances, it is fair reasoning to presume some degree of deliberation from any one or two of them, and to give to the paper, when it is introduced as evidence of the parties' transactions, precisely

dismissed about the time of Greenlee's judgment, under a compromise made between the parties, in the life time of said intestate ; (which was that the said intestate should pay a certain part of costs), to which suit Stevelie had been security to prosecute. At the time of Greenlee's judgment, no assets were in the defendants' hands, which was so found in the verdict in said suit of Greenlee ; and *sci. fa.* had issued against the guardian of the heirs of the plaintiff's intestate, but no judgment thereon ; this suit by *sci. fa.* is yet depend-

such credence as belongs to it, from its partaking more or less of the nature of a deed.

To give this rule a practical application to the case before us, the conclusion would be that, as the paper is without a seal, it cannot be a deed, and is therefore not decisive evidence as that instrument is ; it is not a *final lien* ; but as it possesses some of the essentials of a deed, viz. a formal draught and delivery ; so far it shall be regarded as evidence of no slight nature of the fact it is introduced to establish.

The writers on the law of evidence have accordingly, in arranging the degrees of proof, placed written evidence of every kind higher in the scale of probability than unwritten ; and notwithstanding the splendid eloquence of Cicero, to the contrary, in his declamation for the Poet Archias, the sages of our law have said that the fallibility of human memory weakens the effect of that testimony which the most upright mind, awfully impressed with the solemnity of an oath, may be disposed to give. Time wears away the distinct image and clear impression of the fact, and leaves in the mind, uncertain opinions, imperfect notions and vague surmises.

It is however contended by the plaintiffs, that contracts by our law are distinguished by speciality and by parol ; that there is no third kind, and that whatever is not a specialty though it be in writing, is by parol. To establish this position a case is cited from 7. *Term. Rep.* 350, by which it is certainly proved. But the position being established, whether it will authorize the inference that parol evidence is admissible to vary and extend written evidence will best appear from an examination of the case, and from some attention to the question which called for the solution of the Court.

In the case cited, the declaration states that the defendant being indebted as administratrix, promised to pay when requested, and the judgment is against her generally. From this statement it is manifest, that the promise could not be extended beyond the consideration which was in another right as

ing. Also in the case of Davidson's suit, proceedings are carrying on to subject Stevelie, the security of Spencer. Now since those suits went off (of Davidson and Greenlee) assets to the amount of £94:3:3, have come to the defendants' hands, which are so found by the jury, subject to the opinion of the court, on this case, whether the judgments of Greenlee and Davidson, or either of them, are legally entitled to a preference, in exclusion of the present debt whereon this judgment is rendered. Greenlee's judgment was not entered to

administratrix, and made to bind the defendant personally. But in order to avoid this objection, it was contended that the promise being reduced to writing, the necessity of a consideration was dispensed with; and that the fact of its having been made in writing, might well be presumed after verdict if necessary to support the verdict, which latter position was conceded by the Court.

It is then perfectly evident that the only question in the case, was, whether *nudum pactum* could be alleged against a contract in writing, but without seal. That it could not, had been a notion entertained by several eminent men, and amongst the rest by the learned commentator, who observes that "every bond from the solemnity of the instrument, and every note from the subscription of the drawer carries with it internal evidence of a good consideration." This doctrine however is inaccurate as applied to notes, when a suit is brought by the payee, and is only correct as between the indorsee and drawer. To demonstrate the propriety of the objection it became necessary for the court in *Ram v. Hughes* to enter into a definition and classification of contracts, into those by specialty and those by parol; to which latter division every contract belongs that is not sealed, though it may be written. Every written unsealed contract is therefore, in the strict language of legal precision, a parol contract, and like all others must be supported by a consideration.

But let it be considered, what the court would have said, if the case, instead of requiring them to give a precise and comprehensive definition of contracts, had called upon them for a description of the evidence by which contracts may be supported. They would, I apprehend, have said (because the law says so) the evidence which may be adduced in proof of a contract is threefold: 1st. Matter of record: 2nd. Specialty: 3rd. Unsealed written evidence, or oral testimony. It is therefore necessary to distinguish between a contract, and the evidence of a contract, for though they may be and are, in many cases, identified; yet in legal language a parol contract

subject assets when they should come to hand, by any words expressed by the jury in their verdict delivered by the court.

HALL, J. It is apparent that Greenlee's judgment is no lien upon the assets which have come to the hands of the defendant since that judgment was obtained. It would be difficult to devise a process by which they could be reached, because the plaintiff in that action, after the plea of fully administered was pleaded by the defendant, and found against him by the jury, made his election to proceed against the real estate of defendant's intestate, by signing judgment and issu-

may be proved by written evidence. This is the case now before us, and this brings me to the question it presents, which I understand to be, Whether oral evidence is proper to extend and enlarge a contract which the parties have committed to writing. The first reflection that occurs to the mind upon the statement of the question, independent of any technical rules, is, that the parties by making a written memorial of their transaction, have implicitly agreed, that in the event of any future misunderstanding that writing shall be referred to, as the proof of their act and intention. That such obligations as arose from the paper, by just construction or legal intendment, should be valid and compulsory on them; but that they would not subject themselves to any stipulations beyond their contract: because if they meant to be bound by any such, they might have added them to the writing; and thus have given them a clearness, a force, and a direction, which they could not have by being trusted to the memory of a witness. For this end, the paper is signed, is witnessed, and is mistakenly recorded. But the plaintiff says, besides the warranty of title contained in the writing, the defendant made me another warranty as to the quality, which I can prove by a witness present at the time; and though he has complied with the warranty which was committed to writing, yet he has broken the one which was orally made, whence I am injured and seek compensation.

We are then to decide, Whether the law deems such proof admissible?

By the common law of England there were but few contracts necessary to be made in writing. Property lying in grant, as rights and future interests, and that sort of real property, to which the term incorporeal hereditament applies, must have been authenticated by deed. So the law remained until the stat. 32 H. 8, which, permitting a partial disposition of land by will, required the will to be in writing; but estates in land might still be conveyed by a symbolical delivery in presence of the neighbours, without any written instrument; though it was thought prudent to add security to

ing a *sci. fa.* against the heirs of the intestate, as a pre-requisite to the issuing of an execution against the lands descended to them agreeably to the directions of the act of 1784, c. 11. Had Greenlee intended to rely upon assets to be received by the defendants, subsequent to the time of obtaining his judgment, he ought to have procured a judgment of assets *quando acciderunt*; in which case a *sci. fa.* might have issued conformably thereto, that would have reached the assets in question—6 Term. 1-2 Saunders' Rep. 217—but no such process can issue from the judgment as it stands. That

the transaction by the charter of feoffment. The statute of 29, Car. 2, commonly called the statute of frauds, has made writing and signing essential in a great variety of cases wherein they were not so before, and has certainly increased the necessity of caution in the English courts, with respect to the admission of verbal testimony to add to or alter written instruments, in cases coming within the provisions of that statute. That law being posterior to the date of the charter under which this state was settled, has never had operation here; so that the common law remained unaltered until the year 1715, when a partial enactment was made of the provisions of the English statute.

The law must therefore be sought for in cases arising before the statute of frauds, and expositions upon that statute are no otherwise authoritative than as they affirm or recognize the ancient law. But I believe there can be no doubt that the rule is as ancient as any in the law of evidence, and that it existed before the necessity of reducing any act into writing was introduced.

In Plowden 345, Lord Dyer remarks "men's deeds and wills, by which they settle their estates, are the laws which private men are allowed to make, and they are not to be altered even by the King, in his courts of law or conscience."

In *Rutland's case*, 5 Coke, the court resolved that it was very inconvenient that matters in writing should be controlled by averment of parties, to be proved by uncertain testimony of slippery memory, and should be perilous to purchasers, farmers, &c.

The case of *Meres & al. v. Ansell and others*, in 3 Wilson 275, is directly in point upon the general principle, to shew that parol evidence shall not be admitted to contradict, disannul or substantially vary a written agreement.

judgment, then, cannot stand in the way of the plaintiff.— As to the costs due upon the dismissal of the suit against Davidson, they must be considered as a debt due by the defendants' testator ; because that dismissal took place in consequence of an agreement by him made ; and the defendants

In 2 Atkins 384, Lord Hardwick says "it is not only contrary to the statute but to common law, to add any thing to a written agreement by parol evidence."

All written contracts, says Justice Ashurst, whether *by deed or not*, are intended to be standing evidence against the parties entering into them.— 4 Term. Rep. 331.

1st Ves. jr. 241, parol evidence, to prove an agreement made upon the purchase of an annuity that it was redeemable, was rejected.

In a very recent case, in 7 Ves. 211, we are furnished with the opinion of the present Master of the Rolls, Sir William Grant, than whom no Judge ever ranked higher in the estimation of his contemporaries, for profound and accurate knowledge in legal science, and a proper and discriminating application of well grounded principles to the cases which arise in judgment before him. His observations are, "By the rule of law, independent of the statute, parol evidence cannot be received to contradict a written agreement. To admit, it for the purpose of proving that the written instrument does not contain the real agreement, would be the same as receiving it for every purpose. It was for the purpose of shutting out that enquiry that the rule was adopted. Though the written instrument does not contain the terms, it must in contemplation of law, be taken to contain the agreement, as furnishing better evidence than any parol can supply."

To these authorities I will add a decision of the circuit court of Pennsylvania, because it appears to be in principle the very case under consideration.

An action on the case was brought by the assignee of a bond against the assignor, upon a written assignment in general terms. The plaintiffs offered oral evidence to shew that the defendant had expressly guaranteed the payment of the bond. "CHASE, Justice—You may explain, but you cannot alter a written contract by parol testimony. A case of explanation implies uncertainty, ambiguity and doubt upon the face of the instrument. But the proposition now is a plain case of alteration : that is an offer to prove by witnesses, that the assignor promised something beyond the plain words and meaning of his written contract. Such evidence is inadmissible, and has been so adjudged in the Supreme Court, in *Clark v. Russel*, 3 Dal. 415.

only acted in conformity to that agreement. If so, they could legally, if they thought proper, retain to the amount of those costs in the present action of assumpsit. Although an execution may have issued against them, before the assets in question came to their hands for those costs, and the sheriff,

I grant that Chancery will not confine itself to the strict rule, in cases of fraud, and of trust. But we are sitting as Judges at common law; and I can perceive no reason to depart from it."

I suppose the above authorities are amply sufficient to establish the proposition for which they are cited, and therefore I forbear to make any other references for that purpose. The exceptions to the general rule may be comprised under the heads of fraud, surprise, mistake, in cases of resulting trust, to rebut an equity, or to explain latent ambiguities; and there may also be some other cases which cannot be properly arranged under the titles specified. But as the case stated, is, in my opinion, directly opposed by the general rule, so far as it seeks to establish the proof of warranty as to quality by parol, and presents no fact to bring it within any of the exceptions, it would be needless to multiply authorities with respect to them.

As to the exception on the ground of fraud, I conceive that only occurs, where something intended to have been inserted in the contract, is omitted through the misrepresentation or unfair practice of one of the parties. In such case, the omission may be supplied by parol evidence. But there is no allegation here that the additional warranty was intended or understood by either party to have been inserted in the agreement.

It is also necessary to attend to the nature of the remedy adopted by the plaintiffs in this case, which is founded on the warranty and is in assumpsit. The questions arising upon the general issue are, whether the warranty was made, and whether it was true at the time of making. For if the warranty were made, and not complied with, it is wholly immaterial whether the defect was known to the seller or not, a principle that seems to extend to every case where the plaintiff proceeds on the warranty. But in an action of deceit, the *scienter* or fraud is a material part of the declaration and must be brought home to the defendant to authorise a recovery against him, and in such case it seems from the authorities that proofs of the fraudulent conduct of the defendant may be drawn from sources, *dehors* the written contract. It cannot be contended that inserting the *scienter* in a declaration on the warranty, will convert it into an action of deceit founded on *tort*. In the latter action, the knowledge of the defendant, or something equivalent to it by which the fraud is charged, is a substantive allegation and must be proved; in the former, it is merely surplusage and may be rejected.

on that execution returned *nulla bona*, yet the party interested in that execution, is not precluded from issuing another execution at a subsequent time ; the door is not shut against him, as we have seen it is against Greenlee, by his judgment. It matters not that proceedings are carrying on against Stevelie. It is sufficient that Stevelie has not paid the debt—then it is still due by the defendants. To be sure, if Stevelie had paid the debt, things would be different ; he would then be a creditor like the present plaintiff, and like him sue for his debt, and get it if he could. The result seems to be, that Greenlee's judgment creates no lien on the assets in question ; but that the costs of the compromise do create such lien.

Everett v. Ellison's Administrators, et alios.

Sci. Fa. against the defendants as sureties to an appeal bond. The administrators of the obligor, the principal in the bond, pleaded *plene administravit* ; and no other plea being entered, a verdict was taken against all the defendants. The following reasons were moved in arrest of judgment :

1. That the *sci. fa.* states, there was an appeal to the Newbern Superior Court, whereas the record shews that there was an appeal to the Equity side of the Court. 2. That the bond is not for prosecuting an appeal according to act of Assembly, but for prosecuting an appeal to the Equity side of the Court. 3. That the bond is blank, where it should specify the judgment and costs.

COURT. The defendants by not putting the record in issue have admitted the statements in the *sci. fa.* to be correct.—Whether, independently of the exceptions taken in arrest, and which are confined to the appeal bond, the *sci. fa.* contains sufficient on the face of it, to warrant the judgment of the Court against the defendants, we do not decide. The

reasons are overruled ; but the *sci. fa.* is referred to the Superior Court to pronounce such judgment as the law requires.

Andrews v. Johnson.

This cause originated by way of petition to recover damages for overflowing the plaintiff's land by the defendant's mill-pond, &c. under the act of Assembly in that case provided. The proceedings upon the petition have been regularly had, and a verdict of the jury returned to the last county court of Warren, in favor of the defendant ; upon which verdict the court pronounced judgment against the plaintiff for the cost of the suit : from which verdict and judgment the plaintiff appealed to the superior court of Warren. The question for the decision of the Supreme Court is, Whether this cause is to be tried at bar, or whether a writ is to issue to the sheriff, to summon a jury and try it again upon the premises.

HALL, J. delivered the opinion of the Court :

The act of 1809, which gives the mode of redress by petition now pursued, declares that either party shall be entitled to an appeal to the superior court ; but it is silent as to the mode of proceeding in the superior court. It does not direct whether the jury who are to assess the damages shall assess them at bar or on the premises. The act of 1777, commonly called the Court Law, sec. 82, declares that every plaintiff or defendant dissatisfied with any judgment, sentence or decree of the county court shall be entitled to an appeal ; and sec. 84 further declares, that if the trial of the county court was of an issue to the country, a trial *de novo* shall be had ; and if on a hearing of a petition, &c. a rehearing. In other words (as I understand it) that the same mode of trial shall be observed in the superior court as was directed in the county court ; and this I should take the rule to be in all

cases like the one before us, where an appeal is given to either party, without saying more. If the party appeals from a question of law, the superior court will decide it; if from a question of fact, it is the province of a jury to decide it. In the case now under consideration, the appeal seems to have been from the verdict of the jury. That jury gave their verdict on the premises, agreeably to the directions of the act of 1809; they were directed to go upon the premises to be the better enabled to fix upon the proper quantum of damages. If, then, a jury convened under the authority of the county court, must go on the premises for that purpose, there is the same necessity for a trial on the premises, when it is to be had as to facts in the superior court; where the sole question is as to the quantum of damages, a view of the premises is as necessary and as indispensable for the one jury as the other. I therefore think the trial by jury, in both cases, should be on the premises.

Alexander, County Trustee, v. The Executors of Alexander.

This action was brought to recover money received by the defendant's testator in his life-time as county ranger. The defendant had been dead fifteen years or more. The defendant, among other things, pleaded the ordinary statute of limitations and the statute limiting actions against the estate of deceased persons to seven years. The questions referred to the Supreme Court are, whether the plaintiff's claim is barred by either of the aforesaid statutes of limitation.

By the COURT. The act of 1715 is clearly a bar to the plaintiff's recovery; and it is not therefore necessary to consider the question as to the ordinary statute of limitations.

Alberton v. The Heirs of Redding.

The only question presented to the Court, in this case, is, Whether the lessor of the plaintiff in ejectment, is bound to prove the defendant in possession of the premises which he seeks to recover, although the defendant has entered into the general consent rule to confess lease, entry and ouster.

HENDERSON, J. delivered the opinion of a majority of the Court :

The operation of the consent rule, raises the doubt in this case ; for, very clearly, without it, the plaintiff would be bound to prove the ouster, as a material allegation in his declaration. It becomes therefore necessary to examine the extent of the admissions made by the tenant, by entering into that rule. The confession has never been deemed to acknowledge that, which is the substance of the action, as where the plaintiff's entry is necessary to complete his title, as an entry to avoid a fine, or the like ; there an actual entry must be shewn. The ouster confesses an expulsion from some lands, but whether they are the lands mentioned in the declaration, or those which are in the defendant's possession, creates the difficulty.

Taking the whole record together, it would seem that they are the latter. The plaintiff, either by name or boundary, gives a description (in his declaration) of the lands sued for. This declaration he causes to be served on the tenant in possession, for none but the tenant or his landlord can be made defendant. This is, in substance, saying to the tenant, that you are in possession of the lands described in the declaration ; that whatever description I may have given of them, either by name or boundary, they are the same lands which you possess ; on which the tenant confesses that he ousted the plaintiff from these lands, and relies on his title as a justification. Should it appear at the trial, that the defendant's possession did not interfere with the plaintiff's

claim, it is but just that the mischief should be born by the plaintiff, who has misled the defendant, rather than by the defendant, who has trusted to the plaintiff's assertion. Should it be otherwise, yet the defendant would be compelled to decide at his peril, whether the lands described in the declaration were those possessed by him, although he is told so by the plaintiff; and this, too, where the plaintiff describes by artificial boundaries, the beginning and extent of which may be entirely unknown to the defendant. The practice of disclaimer shews the difficulties to which the defendant was driven; but this carried the remedy too far. By this means, an action commenced on proper ground, would be defeated by disclaiming the very lands which were the cause principally of the suit, and defending as to others to which his title was good. Or, if the plaintiff should after the disclaimer dismiss his suit, he must pay the defendant *his costs*; whereas, if the tenant had declined to defend, there would be no costs due to the casual ejector, but only the plaintiff's own costs to be paid: Nor can the Court so regulate the disclaimer, as not to produce this injury, as some have alleged, by preventing the defendant from disclaiming lands which he had possessed, for the court has no proper mode of ascertaining this fact; and to settle this preliminary point, if it had, would increase litigation and delay, and incur unnecessary expense. A contrary practice would also enable two designing men, more easily to convert the action of ejectment to the means of getting possession of lands, without making the actual tenant a defendant, or apprizing him of the suit. For these reasons, we think that in all cases, whether the consent rule is general or special, the plaintiff is bound to prove the possession of the defendant. In the case in 7 Term. 317, the question was fully considered, and the unanimous opinion of the court given in favor of the Law, as here laid down. The case in Wilson 220, is also an authority, although in that case the landlord defended; for he was certainly placed in his tenant's situation.

TAYLOR, C. J. With the utmost respect for the opinion of my brethren, I cannot consent to innovate upon a long settled rule of practice, without being convinced that it is inconvenient or mischievous in the observance ; but I have never had occasion to remark, that the present mode of proceeding in ejectment, as modified by the course of practice in this state, was productive of any ill effect. That the practice should be different in England, I readily grant ; because the custom there of drawing declarations in very general terms is not calculated to apprise the defendant of the particular lands demanded. As the judges in that country observe, the declaration communicates but little intelligence to the defendant. If he happen to be in possession of any land falling within the declaration, he must defend in order to preserve his own right. In the very case cited from 7 Term. Rep. the declaration was for 30 acres of land, 20 acres of meadow and 20 acres of pasture, within a certain parish ; so that if defendant had any land of that description within the parish, he must defend, in order to preserve it. But the custom, here, of describing with literal exactness the boundaries of the land claimed, leaves nothing for the defendant to doubt about ; or if he should doubt, survey may be had to inform him, whether he claims the land sued for. If he is satisfied, at the first view of the declaration, that he neither possesses the land, nor claims a right to it, he may enter a disclaimer, when called upon to plead ; if he is unable to decide, upon reading the declaration, he may enter into the consent rule, and also have leave to disclaim, if he should afterwards discover, upon a survey, that he ought so to do. It has appeared to me that defendants were perfectly protected by the practice of disclaimer ; and that no injury could arise to either party, under the disposition constantly manifested by the courts, to consider the fictions of an ejectment as within their control, and unfettered by any technical strictness that would frustrate the equitable purpose of bringing forward the real right and title of the parties. If by any fraudulent connivance between two per-

sons, a third were turned out of possession, I apprehend he would be reinstated instantly upon the court's being apprized of such an abuse of the process of the law. My brother LOCKE directs me to signify his unwillingness to alter the practice. But as a majority of the Court think differently, the rule for a new trial is discharged.

Boyt v. Cooper.

This was an action of debt, on a sealed instrument. The defendant pleaded that the bond was given for an illegal consideration. On trial, the defendant wished to give in evidence that the bond was given in consideration of compounding a felony for a rape. This evidence was opposed by the plaintiff's counsel, because the plea was not sufficiently specific to introduce the same. This point was reserved by the Court. The defendant obtained a rule on the plaintiff to shew cause why he should not be permitted to add a *special plea*, upon an affidavit by the defendant, that he had instructed his counsel in the county court, to defend the suit because the bond was given to compound a felony.

Questions for the Supreme Court : 1st. Can the defendant give evidence of compounding of felony for a rape, under the plea of "illegal consideration?" 2d. Can the defendant be permitted to add the special plea, upon the affidavit filed after a trial in the county court, and an appeal taken ; and if he can, upon what conditions?

TAYLOR, C. J. The memorandum on the docket is entirely too indefinite to apprise the plaintiff of the point on which the defendant actually relied. Of the numberless illegal considerations for which a bond may be given, it would be highly unreasonable to expect, that in every instance, the plaintiffs should understand, precisely that one, which the de-

fendant intended to urge, when he entered his plea. But having guessed rightly, and summoned witnesses to explain the intended defence, what should prevent the defendant from afterwards shifting his ground, and setting up some other objection to the bond which the plaintiff was altogether unprepared to repel? But, upon looking into the affidavit filed in the case, the Court are of opinion that the defendant ought to have leave to amend the plea: and as he instructed his counsel in due season, what was the nature of his defence, the justice of the cause seems to require that the amendment should be made without costs.

Page v. Farmer.

Debt on a penal statute. After verdict, the defendant moved in arrest of judgment—1. That the writ is not in the *debet* and *detinet*, but in the *detinet* only. 2. That there was no issue joined between the parties. 3. That the issue joined, if any, was immaterial to the decision of the question. 4. That the jury have given a verdict upon a point not at issue between the parties.

The material parts of the writ are, “To answer Thomas Page, that he render to him the sum of £50, due under an act of the General Assembly, to him, and which from him he unjustly detains, to his damage,” &c.

The defendant pleaded “general issue;” and the jury found that the defendant does owe.

The case was argued by BAKER for the plaintiff, and MORDECAI for the defendant; and the opinion of the Court was delivered by

TAYLOR, C. J. It is not deemed necessary to decide the questions, whether a vicious writ can be taken advantage of

after verdict ; or whether the statutes of *jeofails* extend to an action founded upon a penal statute. The construction of this writ, which presents itself to the Court as the just and necessary one, and derived from the unavoidable import of the words, renders it a writ in the *debet* and *detinet*. Tho' not precisely in the form that the usage of the law has annexed to such process, yet the words in which it is expressed will not, without a strained interpretation, convey a meaning substantially different.

The defendant is called upon to answer to the plaintiff, that he may render to him a sum of money, due under an act of Assembly to him, and which the defendant unjustly detains from him. It is due to the plaintiff, under or by virtue of the act of Assembly, and the defendant cannot detain it unjustly, unless it is due from him. If A call on B to demand payment of a sum of money which the former states to be due to him by bond, and the amount of which he charges the latter with detaining from him, B cannot doubt that the meaning of A is to charge him with owing as well as detaining the money. Whether the writ uses the verb in the present tense, or substitutes for it the passive participle, the charge of owing and detaining is believed in substance to be equally made out. The general issue, then, is *nil debet*, to which the verdict of the jury is responsive, by its finding that the defendant does owe. The Court, therefore, is of opinion, that the reasons in arrest must be overruled.



Strong and others v. Glasgow and others.

The bill in Equity states, that William Sheppard, the father of the complainants, being considerably indebted, with a view to provide payment, came to an agreement with B. Sheppard, to convey to him a tract of land, for which B. Sheppard was to convey to W. Sheppard two other tracts of in-

ferior value by 800 pounds ; to satisfy which difference, B. Sheppard was to pay off all the debts, and indemnify Wm. Sheppard from them. That soon after the agreement, Wm. Sheppard died ; and one of his creditors obtained judgment, and took out execution, which was levied on his slaves, and at the sale, B. Sheppard, intending to perform his agreement, bid off twelve slaves at the price of 133 $\frac{1}{2}$ for the benefit of the complainants. That he took an absolute bill of sale from the sheriff to himself, but that the purchase was really made in trust and for the benefit of the complainants.

The question reserved was, Whether it was competent to the complainants to prove the bond by parol evidence ; which was submitted without argument.

By the COURT. This case is not influenced by the principles that decided the case of *Streeter v. Jones*. The plaintiffs allege here, that the defendant, contrary to the agreement he had entered into, which was to purchase the property for the complainants, took an absolute deed to himself.—The complainants were not privy to that deed, and of course are not bound by it. They are therefore at liberty to produce parol testimony to establish the original contract.

Atkinson, v. Farmer and others.

This is a bill in equity filed against the administrator and distributees of the estate of William Farmer, dec. and prays for relief, upon the following case : William Farmer being indebted to John Atkinson upon bond, died intestate, and administration on his estate was granted to Benjamin Farmer, who was sued by Atkinson, and judgment was recovered.—Execution issued against the goods of the intestate in the hands of his administrator : pending the suit, the administrator delivered to the next of kin who are the defendants, their

several shares of the intestate's estate ; nevertheless the sheriff seized and sold some of the negroes delivered over to the defendant, and complainant became the purchaser at the price of 710 dollars, and took the administrator's bond for the balance of the debt, in consequence of which the sheriff returned the execution "*satisfied*." Not long afterwards, the distributees to whom the said negroes had been delivered as aforesaid, got possession of them, and being advised that he could not recover them, as the title did not pass to him by the sale, and this remedy at law being gone for his debt, complainant further charged that other property had been sold by the administrator, the proceeds of which had not been exhausted by payment of the intestate's debts, and prayed an account of this sale as against the administrator, and a payment to himself of any residue that might be in the administrator's hands ; and as to the next of kin he prayed that they might be decreed to pay the balance of his debt, in consideration of their being in possession of the estate of their intestate.

The distributees defendants pleaded that in settlement of the administration accounts of the estate of William Farmer dec. the administrator had been credited with the amount of the complainant's judgment at law against him, and that the residue of the estate of their intestate only had been distributed amongst them (costs and charges deducted) and some of the said distributees in their answer insist, that by the finding of the jury, it appears, when complainant recovered his judgment against the administrator, there were assets sufficient in administrator's hands to discharge said judgment ; that he gave security for his administration. And complainant's remedy, if any he be entitled to, is against the said administrator and his securities.

The court of equity for Johnston, upon hearing the bill, answers, pleas &c. decreed that defendants should pay to complainants £281 : 19 : 4, that each party should pay his own

costs : from this decree defendants appealed to the Supreme Court.

The case was argued at January term by *D. Cameron* and *Gaston* for the complainants ; and *Seawell* and *Brown* for the defendants. For the complainant was cited, 1 Eq. Ca. Abr. 237 Pl. 15 ; for the defendant, 3 Atkins 91, 406, 3 P. Will. 98, 332.

HALL, J. delivered the opinion of the Court.

It may be well doubted whether the complainant has any remedy to recover this debt, since the execution has been returned satisfied. When property is sold under execution, whether real or personal, there is no warranty of title either express or implied attached to such sale, independent of the act of 1807, c. 4 ; there is no compulsion on any one to purchase, but any one who pleases to do so, runs the risk of purchasing a bad title. If a stranger had purchased in the present instance, could he have recovered his money back again upon finding he had purchased a bad title ? And can it make any difference that the purchaser was the plaintiff in the execution ? I think not. He had the liberty of bidding ; but when he purchased he stood in the same situation with a stranger. He was creditor and purchaser both ; in which of these capacities does he come into court ? As creditor it is said. Suppose, then, that a stranger had purchased and paid the money through the sheriff to the plaintiff, the plaintiff would then have no claim either in law or equity at this day. He would feel himself perfectly satisfied, but the purchaser would not, and it is in fact in that character that the complainant now stands in this court.

It seems to be an established principle, that no man shall be compelled to become the debtor of another, except in cases of bills of exchange paid, when protested, for the honor of the drawer, 1 Term. 20, 1 H. Bl. 83, 91, 3 Esp. Rep. 112. And cases of implied assumpsits do not contradict that rule.

If one person pays off the debt of another, merely because he chooses to do it, he cannot recover the amount so paid from the debtor ; nor does it appear to me, that the case is altered if he voluntarily purchases a bad title, at a sheriff's sale, and thereby discharges it. The law in such case will not imply an assumpsit. There is no privity of conduct (if I may use the expression) between the parties. For these reasons we are inclined to think the complainant cannot recover. We regret that this point had not been stirred at the argument, which must, in part, be our excuse, if we view it improperly. But if the complainant is really entitled to recover, the next question is, who ought to pay the debt ? In common cases the administrator ought to pay ; but if he has delivered the property over to the next of kin, or if, as in the present case, he has delivered over part and wasted part, so as not to be able to pay the debt, the property may be followed into the hands of the next of kin, altho' the administrator has wasted more of the assets than the debt amounts to. But in the present case the complainant stands upon very different grounds. He had a demand at law, and at law that demand has been satisfied, and comes into this court to ask a favor. Then the equity of his request must be examined, as well as the equity of the defendant's objections. What are they ? They state that this debt was paid to, or left in the hands of the administrator for the purpose of paying this debt. As to them then it is paid, the administrator was the proper person to receive it from them, and they have fully paid it, although the complainant never received it. We are then naturally led to enquire who was to blame ? The answer is the administrator, and he is insolvent. The next question is, ought not his securities to pay it ? They undertook for his faithful administration of his estate, in which he has failed, and of course it would seem that they are answerable. But it is said, that they are exonerated at law and equity will not onerate them. Admitting that to be the case, it has been brought about by the con-

duct of the complainant himself by bidding at the sheriff's sale, and having his execution returned satisfied. And if he by that means has put it out of his power to receive his debt from them, others ought not to be liable on that account. If there is really a debt due, the complainant and the securities of the administrator were to become insolvent, probably the defendants would still be liable. But as things stand at present, I think they are not, the defendants having equal equity with the complainants.

The Executors of Spaight v. the Heirs of Wade.

At March Term, 1792, the plaintiff's testator recovered against Thomas Wade and Holden Wade, executors of Thomas Wade the elder, £ 2000 for debt, and £ 8 : 10 : 6 costs, but the plea of fully administered was found for defendants.

The plaintiffs testator then sued out a *sci. fa.* against William Wade, Judith Wade, Polly Wade, Sally Wade, Thomas Vining and Polly his wife, Joshua Prout and Sarah his wife, heirs, devisees and *terre-tenants*; suggesting that Thomas Wade, the elder, died seized of a large real estate, sufficient to satisfy the said debt and costs, which was devised by him to Thomas Wade, the younger, Holden Wade, Polly the wife of Thomas Vining, and Sarah the wife of Joshua Prout; and that Thomas the younger, was dead, and the estate devised to him, had descended upon his heirs at law, the said William and Judith; and that Holden Wade was also dead, and that the estate devised to him had descended upon his heirs at law, the said Polly and Sally; and praying execution of the said debt and costs, against the real estate to them devised and descended, as aforesaid.

Upon the due return of this process, William Wade, Judith Wade, Sally Wade and Polly Wade, appeared by their

guardian and pleaded several pleas, but afterwards withdrew them, and judgment was entered against them, as well as Thomas Vining and wife, by default, but upon condition that the said William, Judith, Polly and Sally, should not be liable for any estate which had come or should come to them other than such as should be derived by devise or descent from Thomas Wade the elder, or Thomas the younger, or Holden.

Joshua Prout appeared for himself and wife, as devisee of Thomas Wade the elder and pleaded nothing by devise on the day of the *sci. fa.* purchased. The plaintiff's testator replied "that lands were devised to Sarah by Thomas Wade the elder upon which issue was joined by demurrer.

The said Joshua Prout also pleaded as terre-tenant that the lands of which he was in possession not mentioned in the devise to Sarah his wife were never bound by any judgment against Thomas Wade, the devisor: upon which issue was joined by demurrer.

The death of the plaintiff's testator has been since suggested, and the plaintiff been duly admitted to revive and prosecute.

Upon this state of pleadings and facts, the case is submitted to the Court:

HALL, J. delivered the opinion of the Court:

It seems to us, that the proper judgment to be entered against the heirs, under the act of 1784, ch. 11, § 2, should be against the lands descended in the hands of the heir, although the heir refuses or omits to point out the lands that have descended. The act directs a *sci. fa.* to issue against the heirs, to shew cause why execution should not issue against the real estate of the deceased debtor, and then declares, that "if judgment shall pass against the heirs or de-

“visees, or any of them, execution shall and may issue
“against the real estate of the deceased debtor in the hands
“of such heirs, &c.” The act of 1789, ch. 39, § 3, declares,
that “where an heir or devisee shall be liable to pay the
“debt of an ancestor, or testator, and shall sell, alien, or
“make over the land, which makes them liable to such
“debts, before action brought or process sued out against
“them, such heir, or devisee, shall be answerable for such
“debt to the value of such land so sold, &c.” Under this
act, where it appears that the lands have been *bona fide* sold
by the heir or devisee, before *sci. fa.* sued out, the debt for
which the land would have been otherwise liable, becomes
their own debt, and judgment must be entered against them,
as if sued at common law, and they had omitted to point out
the lands descended. Thus, under these two acts, it would
appear, that the lands, so descended, or devised, are liable
to the demands of creditors, except when *bona fide* sold, in
which case, the heir or devisee is liable in *propria persona*
for the amount of such sales. No mischief can arise from
such a construction. All lands will be liable under such
judgment, that ought of right to go in discharge of an honest
debt, due by the ancestor or testator. If they have
been *bona fide* sold, before the *sci. fa.* issued, they are not
liable: if fraudulently sold, and in point of fact not in the
hands of the heir or devisee, they are still liable to the demands
of creditors. If they have been sold to satisfy another debt
of the ancestor under a prior lien, they, of course, are not
liable; nor would they be, if sold *bona fide* to satisfy the
debt of the heir or devisee. In which case, I apprehend,
the heir or devisee, under the spirit of the act of 1789,
would be liable as if they themselves had aliened them.
Such judgments will not affect the rights of third persons
not parties to them. When executions issue from them,
plaintiffs must at their peril sell such lands as are liable to
their demands; and all lands which have descended or
have been devised, are so liable, unless they have legally

passed into other hands. The plea states, that the defendant had nothing by descent, at the time the *sci. fa.* issued. If he ever had any lands by descent or devise, it has not been shewn either by him, or the plaintiff, what has become of them, so as to make it necessary to render judgment accordingly; to give judgment against the heir, for instance, in case of alienation by him. The plaintiff replies, that lands had been devised, which is admitted by the plea, if so, he is entitled to judgment and execution against them.

Nelson v. Stewart.

This was a warrant issued by a justice, under the act of 1777 ch. 22,^a the defendant had notice of the proceedings of the freeholders in sufficient time to have made his defence; and the question now submitted to the court was, whether the plaintiffs should be allowed in the taxation of costs for the attendance of sundry witnesses, whom he summoned to prove the truth of the report made by the justice and freeholders.

HALL, J. The question submitted to the Court, is whether the plaintiff ought to be allowed the costs of the atten-

^a That upon complaint made by any person to any justice of the peace of the county of any trespass or damages, done by horses, cattle or hogs, it shall and may be lawful for such justice, and he is hereby required and authorised to cause to be summoned two freeholders, indifferently chosen; who together with himself, shall view and examine on oath, whether the complainants fence be sufficient or not, and what damage he has sustained by means of the trespass, and certify the same under their hands and seals, and if it shall appear that the said fence be sufficient, then the owner of such horses, cattle or hogs shall make full satisfaction for the trespass or damages to the party injured, to be recovered before any jurisdiction having cognizance thereof; but if it shall appear that the said fence is insufficient, then the owner of such horses, cattle or hogs, shall not be liable to make satisfaction for such injury or damages as aforesaid.

dance of the witnesses by him summoned to support the truth of the report, made by the justices and freeholders ; or in other words, whether that report was so conclusive within itself, as that it could not be controverted. If that was the character of the report, of course, it was unnecessary for the plaintiffs to summon witnesses, and they ought to be paid by himself. But I think the report is not entitled to so much credit, nor do I think there ought to be a trial *de novo*. It should be considered so conclusive as to establish a demand, and put the defendant to impeach it and shew that it was improperly made. It should be considered as only *prima facie* evidence of a demand. If it were considered as conclusive evidence of a demand, the defendant would be deprived of his property without the semblance of a trial by jury. It is true, if the party fails to pay the damages, the remedy must be by suit or warrant. But what will that avail him, if he shall not be permitted to examine the report and shew it to be irregular or unjust ? If the legislature had intended it to be conclusive, they might as well have directed the justice to have issued execution for the damages. But what seems conclusive, is, that the law points out no way by which the defendant could appeal. And to say that the report shall not be impeached, is to say that the parties shall be bound by the decision of the justice and freeholders without an opportunity of having a re-hearing before a court and jury.

I think, for these reasons, the plaintiffs ought to recover the costs in question, and consequently that the defendant's motion should be overruled.

TAYLOR, C. J. The legislature have thought proper to confide a portion of judicial power to the magistrate and two freeholders, and their judgment, like that of any other tribunal must be conclusive while it remains in force. Tho' notice is not directed by the act to be given to the defendant, yet it was done in the present case, and he had a full opportunity of cross-examining the witnesses, and adducing

any testimony on his own behalf ; and if after all, manifest injustice had been done to him, he could have put the case in a course of revision in a superior tribunal. This Court is not at liberty to enter into an examination of the justice or injustice of the decision, unless it comes before them in a regular way. They will take care that the persons who act do not exceed the jurisdiction entrusted to them, but while they keep within that, their determination is binding upon the parties to it. On the legislative policy of erecting particular tribunals, there may exist a variety of opinions, and if called upon to declare our own, we should not hesitate to express a wish that the present law particularly might undergo a revision, since it derogates so much from the common law mode of proceeding, that the powers exercised under it, may have the most injurious operation. But as it is a law, we are bound by it, and a majority of the Court are of opinion that the plaintiff ought to pay for the witnesses summoned by him, for the purpose of supporting the certificate of the magistrate and the two freeholders.



Cheatham v. Boykin.

This was a *sci. fa.* upon a refunding bond given by the defendant, to which the defendant pleaded, that the judgment stated in the *sci. fa.* to have been recovered against the administrator, was not justly due ; and that the administrator fraudulently and in collusion with the plaintiffs, suffered the judgment to be entered against him by confession. To this plea there was a demurrer and replication.----DREW for the plaintiff, BROWN for the defendant----The opinion of the Court was delivered by

HALL, J. If that part of the plea, which states, that no debt was due by the administrator, stood as a distinct plea to itself, and was to be allowed, it would be incumbent on

the plaintiff to prove his demand over again upon the *sci. fa.* after having already obtained judgment against the administrator, and that too, merely at the suggestion of the defendant, which ought not to be allowed. But when the defendant, in addition to that suggestion, states that the judgment was fraudulently obtained, he places the burthen of proof on himself, and the judgment remains good until he verifies his plea, which if he does, judgment ought not to be given against him on the *sci. fa.* The plea appears to be indivisible and in substance this—that the judgment against the administrator was obtained through fraud, which he may substantiate, if he can. The demurrer should be overruled. The objection, that a *sci. fa.* cannot issue from a decree on a petition, we think unfounded: it is convenient and within the spirit of the act that gives the *sci. fa.* on the bonds of distributors when their shares have been delivered over.